93-815

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

MARY E. HARRIS,

Petitioner,

vs.

SKI PARK FARMS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Washington State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the issuance of an abandonment notice by the Interstate Commerce Commission for a federal land grant railroad right-of-way trigger an instantaneous termination of the easement of the right-of-way on the title of the servient estate, or must the landowner take legal action to quiet title, re-enter, or eject to clear the encumbrance of the right-of-way from the fee of the land?

2. Since the termination of an easement requires an action on the part of the grantee of the easement, must a railroad disclaim, quit claim, or default on its interest in a right-of-way, after the abandonment notice is issued by the Interstate Commerce Commission, for the servient estate to be unemcumbered by the easement of the right-of-way?

3. Does the abandonment of a federal land grant railroad right-of-way easement affect the title to the fee of the servient estate, or does the fee of the servient legal subdivision of land remain unaffected by the act of abandonment?

4. Does 42 Stat. 414, USC Title 43 Sec. 912, "An Act to Provide for the Disposition of Abandoned Portions of Rights of Way Granted to Railroad Companies", require claimants/owners of abandoned railroad lands to take legal action to quiet title, re-enter, or eject in appropriate courts of law, for title to vest free of the encumbrance of the right-of-way?

5. Can the phrase "excepting railroad right-of-way" in a chain of title change meaning from "excepting an easement" before the date of abandonment to "excepting a fee for the grantor" after the date of abandonment, when the grantor has

QUESTIONS PRESENTED – Continued

taken no action to quiet title, eject, re-enter or clear title to the servient estate?

6. Does the phrase:

> "Provided, That this Act shall not affect conveyance made by any railroad company of portions of its right-of-way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by an Act of Congress . . . "

(42 Stat. 414, U.S.C. Title 43, Sec. 912, March 8, 1922) require, by implication, that the railroad must be formally notified, and become a party to a quiet title action on its abandoned right-of-way, so that any conveyance, encumbrance or covenant which was established on the right-of-way during the tenure of the railroad, can be legally established, recorded and protected during the quiet title process?

7. Are Section 3, Land Grant Act of 1864 railroad rights-of-way currently construed by federal courts to be "easements" rather than limited fees with implied rights of reverter.

PARTIES TO THE PROCEEDING

The Petitioner is Mary E. Harris, who was the Plaintiff in the Trial Court, the Respondent at the Court of Appeals, and the Petitioner and Appellee at the Washington State Supreme Court.

The Respondent is Ski Park Farms, Inc., a Washington Corporation, which was Defendant in the Trial Court, Appellee at the Court of Appeals, and Respondent at the Washington State Supreme Court.

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In The

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MARY E. HARRIS,

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Petition For Writ Of Certiorari
To The Washington State Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mary E. Harris,

Petition for a Writ of Certiorari to review the decision of the Washington State Supreme Court, filed on June 8, 1993.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Washington filed on February 11, 1993 is included at Appendix "A". The Order denying Motion for Reconsideration by the Supreme Court of the State of Washington is included at Appendix "B" and is dated June 8, 1993. The Mandate of the Supreme Court of Washington, dated June 10, 1993 is included at Appendix "C". The Opinion of the Court of Appeals of the State of Washington, Division Two, dated February 25, 1991 is included at Appendix "D". The Amended Opinion of the State Court of Appeals, dated August 15, 1991 is included at Appendix "E". The Findings of

Fact and Conclusions of Law of the Superior Court of the State of Washington in and for the County of Pierce dated September 7, 1988 is included at Appendix "F". The Default Judgment No. 87-2-01090-8 of the Superior Court of the State of Washington in and for the County of Pierce, dated December 31, 1987, is included at Appendix "G".

JURISDICTION

The Order Denying Motion for Reconsideration by the Supreme Court of Washington was filed on June 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

The Petitioner has property rights which vest pursuant to 42 Stat. 414, U.S.C. Title 43, Sec. 912 and 13 Stat. 358. The Supreme Court of the United States is the next level of appeal to adjudicate and interpret the federal statutes involved in this case. Other relevant statutes are 49 U.S.C. 10903, P. L. 95-473, the issuance of a Certificate of Railroad Abandonment, and 13 Stat. 358, July 2, 1864, The Pacific Grant of Lands to Railroads.

The Petitioner has 90 days from June 8, 1993 to request Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal "Act to provide for the disposition of abandoned portions of rights-of-way granted to railroad companies" provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever public lands of the United States have been or may be granted to any railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then

and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: Provided, That this Act shall not affect conveyances made by any railroad company of portions of its right-of-way if such conveyance by among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right-of-way: Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same."

Approved, March 8, 1922 (42 Stat. 414, U.S.C., Title 43, Sec. 912)

The Interstate Commerce Commission has the authority under 49 U.S.C. 10903, P.L. 95-473, to issue certificates of abandonment for portions of railroad rights-of-way:

"(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. . . . "

(C) Except as provided in sections 10905 and 10906 of this title –

(1) if a certificate is issued without an investigation under section 10904 (c) of this title, the abandonment or discontinuance may take effect under the certificate on the 30th day after the issuance of the certificate; or

(2) if a certificate is issued after an investigation under Section 10904 (c) of this title, the abandonment or discontinuance may take effect under the certificate on the 120th day after the issuance of the certificate.

How do these federal statutes operate to affect the title of the servient estate? When does title vest free of the encumbrance of the right-of-way?

STATEMENT OF THE CASE

1. Statement of Facts:

a. Nature of the Dispute:

The nature of the dispute is a quiet title action on an abandoned railroad right-of-way of a federal land grant railroad. Petitioner Harris is claiming reversionary interests as the owner of a legal subdivision of land over which the railroad right-of-way existed. These interests vest pursuant to 42 Stat. 414, U.S.C., Title 43, Sec. 912, the Disposition of Abandoned Portions of Railroad Rights of Way.

On October 29, 1987, Opal Winkelman conveyed to Mary Harris, the Petitioner, the disputed property which consists of a parcel between 140 and 200 feet wide and approximately 1400 feet long, which is situated between two highways in Pierce County, Washington State. The parcel also contains a 193 foot long railroad trestle and a ten inch spring which runs under the trestle. It is valuable to Harris because it serves as access to her adjoining land and is continuous with it. Two parcels were conveyed by the warranty deed: one in Section 27 and one in Section 26. Both properties were bisected by the right-of-way of the Burlington Northern Railroad, as successor in interest to the Northern Pacific Railroad. The notice

of abandonment was issued for this right-of-way by the Interstate Commerce Commission of February 15, 1985, but Winkelman took no action to re-enter, or quiet title the land burdened by the right-of-way.

Winkelman acquired her interest in the disputed property by warranty deed in 1946 from Sabin. The Sabin deed said:

> "*except the right-of-way of the Northern Pacific Railway Company.*" (emphasis supplied)

In July, 1987 Harris entered into a Purchase and Sale Agreement with Winkelman to buy the following:

> "All of that portion of tax parcel number 05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.* (emphasis supplied)
>
> "All of that portion of tax parcel 5-19-26-2-007 lying between South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.*"

Winkelman was exclusively represented by real estate broker Clark McGowan who ordered a title report. *App. H-17. The title report disclosed two relevant exceptions – lis pendens to quiet title on the abandoned Burlington Northern Railroad Right-of-Way and the other was a continuing interest of the railroad in the property. See App. H-1-3.*

On October 29, 1987, Winkelman delivered a Statutory Warranty Deed to Harris. Harris paid $7,000.00 for the property:

> Parcel A: That portion of the west half of the northwest quarter of Section 26, Township 19 North, Range 5 East of the W.M., Pierce County, Washington, lying southeasterly of South Prairie Creek and northwesterly of South Prairie-Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.* (emphasis supplied)
>
> Parcel B: That portion of the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 East of the W.M., Pierce County,

> Washington, which lies southeasterly of the southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie-Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.* Situate in Pierce County, Washington. (emphasis supplied)

Surveyor John Becker, Winkelman's agent, prepared the legal description for the warranty deed. *App. H-15-16.* He was not instructed to except a free interest in the right-of-way for the grantor. Had he been so instructed, he would have used other language. *App. H-15-16.*

The status of Burlington Northern's interest in the right-of-way was unclear at the time of the sale of the land to Harris. Since Harris owned an adjoining land parcel for several years, located between Parcel A and Parcel B, that was also bisected by the abandoned railroad right-of-way, she attempted to determine the significance of the abandonment on her land. She started a paper trail of letters to and from the Interstate Commerce Commission, Burlington Northern, County Assessor, County Prosecuting Attorney and other attorneys. *See App. I-1-11.*

Harris discussed the railroad's interest in the land purchase with McGowan before and after the closing of the sale.

On February 24, 1988, Ski Park Farms, Inc. paid Winkelman $250.00 for a quitclaim deed purporting to convey Winkelman's interest in the disputed property and in other property, formerly subject to the abandoned railroad right-of-way.

This quitclaim deed stated:

> "That portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillan to Buckley, Washington Branch Line right-of-way, now abandoned, located upon, over and across section 27, Township 19 North Range 5 East, W.M. described as follows:
>
> All that portion of said Railroad Company's 400 foot wide Branch Line right-of-way being 200 feet on each side of said Main Track centerline in

> the North half of the Southeast quarter of said Section 27, lying Northerly of the West production of the South line of Lot 6 of Survey No. 8701200255, recorded January 2, 1987, and South of the North Line of said North half of the Southeast quarter of said Section 27.
>
> Also all that portion of said Railroad Company's 200 foot wide Branch Line right-of-way being 100 feet on each side of said Main tract centerline in the Southeast quarter of the Northeast quarter of said Section 27, lying North of the South line of said Southeast quarter of the Northeast quarter of said Section 27."

The quitclaim deed of February 24, 1988, is the sole basis upon which Ski Park asserts title to the property. The disputed area covers about one-third of the area covered by the quitclaim deed. So, Ski Park paid $83.00 for the disputed land.

B. Procedural Background:

1. By an Act of Congress on July 2, 1864, the Northern Pacific Railroad was empowered to construct a railroad right-of-way for the purpose of connecting Lake Superior and Puget Sound on the Pacific Coast:

> "An act granting lands to aid in the construction of a railroad and telegraph lines from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route, approved by the President of the United States."

Under Section 3 of this act the railroad was given odd sections of land along the route, to sell, to aid the construction process. Section 05-19-27, east of the Willamette Meridian, Pierce County, Washington, was such a section. The Act of 1864 granted 40,000,000 acres to the railroads.

2. On April 26, 1876, the Northern Pacific Railroad sold 386 acres of this section to Samuel Wilkeson, Jr. The deed of the NPRR to Wilkeson specified, however:

> ". . . *Reserving and excepting, however, from the above described premises, a strip of land, two hundred feet wide, extending through the same on the line of the road of the said Northern Pacific Railroad Company,* or on the line of any of its branches to be and for a right-of-way, or for other railroad purposes in case the line of said railroad or any of its branches, has been or shall be, located on or over, said described pieces or parcels of land and premises, being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said act of Congress, approved the second day of July 1864. . . . " (emphasis supplied)

3. On March 8, 1922, Congress passed "An Act to Provide for the Disposition of Abandoned Portions of Rights of Way Granted to Railroad Companies." (see Jurisdiction, page *3*). This statute, 42 Stat. 414, U.S.C., Title 43, Sec. 912 is a federal mandate for the orderly assimilation of abandoned portions of rights-of-way back into the countryside and servient estates from which they came. (In 1985 through 1988 about 12,000 miles of right-of-way were abandoned, most being easements.)

4. On February 15, 1985, the Interstate Commerce Commission issued a certificate of abandonment under 49 U.S.C. 10903 to Burlington Northern Railroad, the successor to the Northern Pacific Railroad, allowing abandonment of its right-of-way in 05-19-27 E.Wm., Pierce County, Washington. This was a 26 mile abandonment that involved about 464 parcels of land and 273 landowners of servient estates.

5. In the following two years, Burlington Northern proceeded to remove its rails, ties and culverts, but it did not remove its trestles, nor disclaim its interest in the right-of-way. Burlington Northern continued to pay property taxes on the entire right-of-way, after the issuance of the ICC abandonment. The railroad left a 193 foot long trestle on the property in dispute, and nine other bridges.

6. On February 27, 1987, Harris and others filed a complaint to quiet title property subject to former railroad right-of-way. This was *Mary E. Harris et al. v. Burlington*

Northern Railroad et al. 87-2-011090-8. Two lis pendens to quiet title were filed with the county auditor, the original, and an amended one.

7. On July 24, 1987, Harris and Winkelman signed a Purchase and Sale agreement for two parcels of land.

8. On October 29, 1987, Winkelman issued a warranty deed to Harris.

9. On December 28, 1987, Burlington Northern disclaimed/quitclaimed its *App. H-7-8* interest in the right-of-way to the 40 specific plaintiffs in default action.

10. On December 31, 1987, the 40 plaintiffs, including Harris, obtained a Default Judgment #87-2-01090-8 from the Honorable E. Albert Morrison. *See App. G-1-4.*

11. On January 26, 1988, Asset Recovery Inc., an agent and contractor for Burlington Northern Railroad wrote a bill of sale for $1.00 to Pierce County for the ten railroad trestles. The 193 foot trestle on the disputed land was purportedly being sold for 10¢ (1/10 of $1.00). *See App. H-19.*

12. About February 11, 1988, Harris and her contractors began salvage operations on the trestle on her land. On or about February 12, 1988, a Pierce County Sheriff drove on the property and arrested Harris, and her contractors for failing to heed a warning notice to cease and desist the operation which had been given the previous day. Harris showed the sheriff a copy of the default judgment proving her ownership of the land, referred him to her attorney, and told him that she would sue him for false arrest. He rescinded the arrest order, apologized, told them to proceed, and left.

13. On February 24, 1988, Ski Park obtained a quitclaim deed for the disputed property and other land as well.

14. On February 26, 1988, the landowners of the quiet title group, including Harris, and their attorney were called into Judge Morrison's court again. Pierce County Deputy Prosecuting Attorney Roger Miener appeared in court waving the quitclaim deed of Ski Park and the $1.00 bill of sale to the county. His intent was to show confusion about the ownership of the trestles in order to get a restraining order preventing further bridge demolitions. One landowner cut his bridge

down with a chain saw. Judge Morrison issued the restraining order. The quitclaim deed was not filed with the county auditor until March 1, 1988.

15. In March 1988, Ski Park moved to vacate the default judgment against unknown parties claiming that it was never named, nor served. *See App. H-5-6.* Judge Morrison vacated the default judgment and agreed to review the Harris quiet title action with respect to the disputed property. Case 87-2-01090-8 became bifurcated. Ski Park brought a motion for Summary Judgment to quiet title the property described in the quitclaim deed. Harris filed a cross-motion for Summary Judgment to quiet title that property as conveyed to her by the Winkelman warranty deed.

16. On March 12, 1988, Plaintiff Owen Dickson of the group quiet title action died in a fall from the old railroad trestle that was left on his property.

17. On March 25, 1988, the landowners and their attorney were called back to court. Deputy Prosecuting Attorney Roger Miener, representing the county, disclaimed all interest in the old railroad trestles, admitted that the $1.00 bill of sale, *App. H-19*, based on a defaulted demolition contract was worthless, admitted that the trestles had become part of the realty of the land, and that whoever owned the land also owned the bridges. The county agreed to board up the trestles and post NO TRESPASSING signs on them.

18. On July 5, 1988, Judge Morrison denied both motions for Summary Judgment and ruled that the dispute between Harris and Ski Park presented factual questions inappropriate for a resolution as summary judgment. Ski Park filed a motion for reconsideration of the court's ruling. Harris filed a similar one. The court heard these motions on July 22, 1988. Both parties stipulated that there were no issues of material fact. The court heard again the motion for Summary Judgment and quieted title in the disputed property to Harris. Ski Park filed a further motion for reconsideration on August 17, 1988. This motion was denied. On September 7, 1988, the court entered written Findings of Fact and Conclusions in support of a judgment quieting title to the disputed property in Harris. *App. F-1-7.*

19. Ski Park appealed to the Court of Appeals on October 5, 1988. Ski Park sought a reversal of the trial court's decision. On February 25, 1991, the Appeals Court filed a Memorandum Decision reversing and remanding the trial court with instructions "to enter summary judgment quieting title to the property within the right-of-way adjacent and adjoined to the Ski Park property in Ski Park Farms, Inc." However, no Ski Park land abuts the disputed parcel which is bordered by two highways. *See App. H-4 map.*

On reconsideration, the Court of Appeals issued a new opinion and remanded to the trial court to quiet title to the disputed parcel in Ski Park on August 15, 1991. The Court of Appeals' decision considered the right-of-way in the Sam Wilkeson chain of title to be limited fee with implied condition of reverter." The State Court of Appeals stated that the phrase "excepting right-of-way of Burlington Northern Railroad" was superfluous, that, therefore, the language must have some other meaning, that is, "to except the fee interest in the right-of-way land for the grantor Winkelman, since the fee had passed to Winkelman free of the encumbrance of the right-of-way on February 15, 1985."

20. Harris appealed to the State Supreme Court of Washington. Although the State Supreme Court acknowledged that most railroad rights-of-way are easements, and made no mention of the limited fee with implied right of reverter, the court treated the conveyance as though the right-of-way were a determinable fee rather than an easement which requires action in court by the owner of the servient estate to terminate. *See App. A-1-25.*

21. A Motion was made by Harris for Reconsideration of the State Supreme Court decision. Harris filed another brief alluding to the confusion of the irrelevant sale of Lot # 6 to Ski Park with the Winkelman – Harris sale. A certified copy of Harris' signed Declaration was also sent. *See App. H-9-12.* The Clerk of the Pierce County Court failed to send the correct document to the State Supreme Court – Harris' signed Declaration of July 7, 1991. On June 8, 1993, the Motion for Reconsideration was denied. The Court issued a

Mandate for the disputed property to be quieted in the name of Ski Park on June 11, 1993.

22. Petitioner Harris now appeals to the Supreme Court of the United States as the next level of appeal, since there are federal issues and statutes involved in this dispute and Harris is claiming property rights which vest pursuant to 42 Stat. 414, U.S.C., Title 43, Sec. 912. Petitioner Harris appeals to this Court to reverse the Opinion of the State Supreme Court of the State of Washington, affirm the Findings of Fact and Conclusion of Law issued by the trial court on September 7, 1988 by the Honorable E. Albert Morrison, and quiet title the disputed land in Mary E. Harris.

REASONS FOR GRANTING THE WRIT

1. Evolutionary Concept: Railroad Right of Way Easement

Petitioner, Mary Harris, is the successor-in-title to Sam Wilkeson, Jr. who received a deed subject to the railroad right-of-way of the Northern Pacific Railroad in 1876. When Wilkeson bought the land there was a "floating" easement of the right-of-way on the title of the land, because the right-of-way was not established until about ten years later.

The Pacific Railroad Land Grant of 1864 was the vehicle through which the railroad came into ownership of Section 27, the land in which tax parcel # 05-19-27-1-003 is located. *See App. H-4*. For the first several decades, the old Section 3, railroad land grants were viewed by both the federal courts and Congress to be rights-of-way of limited fee with implied rights of reverter. This reverter referred to the United States government.

Later with the subsequent court decisions expanding the concept of easement, the limited fee concept became obsolete. In 1957, the Supreme Court in *United States v. Union Pacific Railroad*, 353 U.S. 112, 77 S.Ct. 685, 1 L.Ed. 2d 693 (1957), modified the "limited fee" concept by stating: "The most that the limited fee cases decided was that the railroad received all

surface rights to the right-of-way incident to use for railroad purposes." *Id.* at 119 S.Ct. at 689.

In 1922 Congress passed a law designed to dispose of abandoned portions of railroad rights-of-way in an orderly fashion, 42 Stat. 414, U.S.C. Title 43, Sec. 912. This statute provided that federally granted railroad rights-of-way would vest in the owner of the legal subdivision of the servient estate upon abandonment. This law applied to the 1862, 1864, 1871 and 1875 right-of-way grants. It is applicable to the odd section land grants out of which parcel 05-19-27-1-003 was carved. *See App. H-4 map.*

The federal courts continued to contemplate the nature of railroad rights-of-way, and ultimately, in the 1979 decision of the 10th U.S. Circuit Court of Appeals, *Energy Transportation Systems, Inc. v. Union Pacific Railroad,* 606 F.2d 934 (1979), it was held that the railroad's predecessor in interest (the original railroad) as grantee of odd-numbered sections of land along its railroad line under Section 3 of the Pacific Railroad Act of 1862, acquired the servient estate also; that the railroad subsequently conveyed that servient estate to other grantees; and that therefore, the subsequent grantees had the power to effectively convey easements to ETSI, for its underground coal and slurry pipeline beneath the railroad's right-of-way. *Id.* at 938. This opinion is applicable, therefore, to Sam Wilkeson's interest as being a fee interest in the servient estate burdened by the easement of the railroad right-of-way. Both the Act of 1862 and 1864 are identically worded and have equal intent, hence the above decision is applicable to the 1864 land grant, Section 3, lands.

The timely Washington State Supreme Court decision of *Lawson v. State of Washington,* 107 W.2d 444, 730 P.2d 1308 (1986) made it clear that most railroad rights-of-way in Washington State are construed to be easements, within the broadened definition of the term. Harris original land parcel excepted "the right-of-way of the Northern Pacific Railroad *easement.*"

2. Burlington Northern Abandonment

Harris organized a group of landowners along the right-of-way, formed a corporation, and began a group quiet title action. Attorneys advised that a quiet title action would be necessary to clear title to the old right-of-way. The attorneys did exhaustive title and map searches throughout 1987.

Harris' original parcel was also bisected by the old right-of-way. She was interested when she read about the abandonment. Previous to the date of abandonment, and after, Harris had written to and telephoned Burlington Northern, about leasing the right-of-way, or about buying it and putting the pieces back together again. Harris began a paper trail *See App. I-1-11* of letters, to and from the ICC, Burlington Northern, the Assessor, the Prosecuting Attorney, and various other attorneys. *See App. I-4-5*, a letter dated July 14, 1986, from R.C. Flaherty, General Manager Real Estate, BN, Ft. Worth, Texas referring to an offer to "sell" and a "minimum fee for a deed and mortgage release" of $2,000.00. This letter is evidence of Burlington Northern's belief in its ownership and continuing interest in the right-of-way one and one half years after "abandonment".

The County Prosecuting Attorney advised that the Assessor would not perform segregations nor establish boundary lines because Burlington Northern had not yet disclaimed its interest in the right-of-way and the acquisition varied considerably along the 26 mile abandonment. *See App. I-10-11.*

Harris purchased two parcels of land from Winkelman that were traversed by the Act of 1864 abandoned railroad right-of-way. Winkelman conveyed her fee interest in the legal subdivisions of land to Harris, still burdened by the easement of the right-of-way which Winkelman had not quieted. The parcels were about 80% burdened by the easement of the railroad right-of-way.

Harris amended her previously recorded lis pendens and added a new lis pendens through her attorney, to include the newly purchased land in the quiet title action. *See App. H-1-3 # 4.* The quiet title action was legally advertised on September 3, 1987 as prescribed. *See App. H-5-6.*

Puget Power answered, as a respondent, and claimed interest in a powerline right-of-way which Burlington Northern had given it several decades earlier. *See Question 6, page 11.* This covenant was agreed to and provided for within the new legal descriptions. Finally, on December 28, 1987, Burlington Northern disclaimed or quitclaimed its interest in the right-of-way. In Harris' case BN disclaimed its interest to her. *See App. H-7-8.* On December 31, 1987, a Default Judgment was entered. *See App. G-1-4.*

On February 26, 1988, Harris and her attorney first became aware of the quitclaim deed from Winkelman to Ski Park. A six year legal battle ensued. Since the Default Judgment was without flaw that decision with respect to Harris' land should not have been vacated.

Respondent Ski Park, by virtue of the quitclaim deed from Winkelman was legally able to quiet title portions of the right-of-way outside the scope of the Harris legal subdivisions, but after the Harris quiet title action on 05-19-27-1-003, Winkelman held no more interest in that subdivision of land. It should be noted that the quit claim deed from Winkelman also covered the abandoned right-of-way land claimed and/or quiet-titled by two other plaintiffs in the Harris quiet title suit.

The lower court reasoned that Winkelman showed evidence of with-holding a fee interest in the right-of-way by later quit-claiming it to Ski Park. What did her quit claiming the interests of the other two land owners to Ski Park serve to indicate – when she had no interest to convey to them? Hence, if the Harris quiet title action was proper the only thing that Winkelman was quit claiming to Ski Park was the remainder after the Harris land and the land of the other two persons were extracted from it. A quit claim deed is no guarantee of interest.

Ski Park paid a nominal amount for the quit claim deed to the disputed land, about $83.00. Harris paid $7,000.00 for land which was about 80% encumbered by a railroad easement, the title to which had to be quieted to vest free of the encumbrance.

3. Ski Park is Not Successor in Title to Legal Subdivision

In Superior Court and in the Court of Appeals, Ski Park attempted to claim ownership of the disputed parcel by being an adjacent land owner. But no part of Lot # 6, a surveyed and recorded subdivision lot of 60 acres lies adjacent to the disputed land. A sixty foot wide highway separates Lot # 6 from the disputed land. Furthermore, in *Brown v. Weare*, 152 S.W.2d 649 (1941), it was held that a legal subdivision, bounded and enclosed by definitive survey lines through which no right-of-way passes, cannot claim right-of-way outside its definitive boundary. Hence, no right-of-way was conveyed by Winkelman to Ski Park by the sale of Lot # 6. The Court of Appeals and the State Supreme Court opinions were, erroneous when they relied on the sale of Lot # 6 as evidence of anything. The sale price of Lot # 6 is also irrelevant, and was introduced in an effort to confuse the situation.

4. No Ambiguity in Deed

There is no ambiguity in the language of the warranty deed. The language was proper and necessary for conveyance of the two legal subdivisions burdened by the easement of the right-of-way which had not yet been terminated for title purposes. It must also be reiterated that Burlington Northern had not yet disclaimed its interest in the right-of-way, and the quiet title action was not finished until December 31, 1987, about two months *after* the Harris purchase. The railroad right-of-way remained an easement on the servient estate both before the date of the ICC abandonment and after that date, until Harris terminated it in December of 1987. The granting clauses of both the Purchase and Sale Agreement and the warranty deed synchronize with each other on defining the boundaries of the legal subdivisions of land. Although the Harris purchase and sale agreement contains the language "excepting the Northern Pacific Railroad right-of-way easement" that phrase equates with the current federal judicial concept of such a right-of-way. That is, *Energy Transportation Systems, Inc. v. Union Pacific Railroad*, supra opinion,

clearly perceived this type of right-of-way to be an easement. The language of the warranty deed, although more technical, is parallel in scope and in intent. The exception of the right-of-way in the warranty deed is also consistent with the historical language, and the federal judicial interpretation is that this language creates an easement for a railroad.

An easement of a railroad right-of-way is a burden on the servient estate. The easement cannot be erased unilaterally by the owner of the servient estate (even after ICC abandonment notice) because the termination of an easement requires a quiet title or similar action. The act of abandonment does not affect the ownership of the fee of the servient estate, but the estate is passed on encumbered from one successor to another. Only the grantee of an easement can terminate the burden on the servient estate, either by issuing a recorded disclaimer of interest, a quit claim deed, or participating in some manner as defendant or respondent in a quiet title action.

5. Interstate Commerce Commission – Abandonment

Although the ICC issued a certificate of abandonment on February 15, 1985, this act, alone, did not terminate the easement of the right-of-way for title purposes. For that reason, the County Prosecuting Attorney refused to issue segregation orders to the assessor's office, and for that reason the forty plaintiffs had to go through the long and costly process of quiet titling.

Winkelman declared that she was not aware of the abandonment of the right-of-way. It is difficult to believe that an owner whose land is bisected by a railroad, would not notice that no trains ran there anymore, that the ties were rotting and that there were saplings growing up between the tracks. This, at least, indicates a physical abandonment, through disuse. Furthermore, Winkelman's Broker, McGowan, had constructive knowledge of the abandonment, because it was he who ordered, reviewed and approved the title report with the two recorded lis pendens to quiet title to portions of the abandoned Burlington Northern Railroad right-of-way. *See App. H-1-3*. Therefore, he is charged with having knowledge of

both the abandonment and the intent to quiet title. As he was Winkelman's exclusive representative, she is charged, also, with having knowledge of both of these facts. No objection was ever voice by McGowan or Winkelman to the lis pendens on the title policy. Therefore, the grantor consented to the lis pendens as a condition of sale. The lis pendens encumbrance became binding upon the grantor and the grantee.

6. Encumbrances to be by Deed

The Revised Code of Washington State provides that conveyances and encumbrances are to be by deed: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate shall be by deed. . . . are hereby declared to be legal and valid". RCW 64.04.010. The Purchase and Sale Agreement specified under encumbrances: "Those acceptable to purchaser". The lis pendens to quiet title to the abandoned railroad right-of-way was legally assembled in the land purchase as an encumbrance and became binding by state statute.

7. Doctrine of Merger Does Not Apply

Ski Park attempted to convince the Court of Appeals and the State Supreme Court that Harris somehow modified her intent by accepting a warranty deed without the word easement. This is an illogical assumption. An objective analysis of the language of both instruments, in light of today's federal judicial interpretation of "right-of-way" will conclude that both mean the same thing: a continued reservation of interest in the right-of-way for railroad purposes, a reservation of easement, belonging to the Burlington Northern Railroad. This theory of merger is also dispelled by the fact that Harris' intent remained consistent as proved by all of her actions from 1986 through 1987: Harris intended to obtain the encumbered fee and quiet title it.

8. Extrinsic and Parol Evidence Demonstrates Harris' Intent

Harris seeks reversal of the lower court's decision and affirmation of the trial court's decision quieting title in the disputed property to her. Her intent to purchase the fee, subject to the railroad right-of-way easement is demonstrated by:

1. Harris states her intention in her certified declaration. *See App. H-9-12.*
2. Harris' Purchase and Sale Agreement states her intent by using the word "easement".
3. The title report, ordered by Winkelman, grantor, put Winkelman on notice of Harris' lis pendens and intent to quiet title the abandoned right-of-way. The grantor did not object, which demonstrates the grantor's intent. *App. H-1-3, # 8 and # 9.*
4. The grantor's agent, Becker, prepared the deed. He was not instructed to reserve a fee for the grantor. If he had been instructed to do so he would have used other language. *App. H-15-16.*
5. Under the Purchase and Sale Agreement, Winkelman was obliged to issue a warranty deed (not a quit claim deed), subject only to an easement, demonstrating grantor, Winkelman's, intent.
6. The Purchase and Sale Agreement specified under # 2 Encumbrances: Condition of Title: Title is to free of all encumbrances and defects except: "Those acceptable to purchaser." The lis pendens to quiet title, encumbrance, therefore, became doubly binding between grantor and grantee.
7. At the time of the transaction, the encumbrance of the railroad right-of-way had not been terminated, therefore, the warranty deed from Winkelman, had to conform to the historical language of exception of the railroad right-of-way. Legally and historically, this right-of-way was an easement, not a fee.
8. The parallel of language between the deeds of Sabin to Winkelman to Harris, serves to indicate that they have a parallel meaning and intent.

9. State Supreme Court Calls "Easement" Confusing

The lower court's decision, *App. A-19*, states:

> "Then, in considering Ski Park's evidence, the court said: 'The real estate contract between Winkelman and Ski Park dated April 23, 1987, which antedates the October 29, 1987, Statutory Warranty Deed to Petitioner Harris, at least provides some support to a conclusion that Winkelman intended to reserve a fee interest in the railroad right-of-way, not withstanding the confusion created by the language in the Purchase and Sale Agreement prepared by Petitioner Harris.' "

Since the April and October sales are totally unrelated, it is impossible to discern what "confusion" is created by Harris in her clear use of the term "railroad right-of-way easement", which is a right distinct from ownership.

The April 1987 purchase of Lot # 6 by Ski Park contained no land burdened by railroad right-of-way easement. Therefore, the lower court's reasoning is not logical.

10. Declaration of Becker: Author of Deed

The Court should weigh the testimony of Winkelman's agent Becker, who prepared the language of the Harris Warranty Deed. *See App. H-15-16.* He declared that Winkelman did NOT instruct him to reserve the fee for the railroad right-of-way in preparing the language to convey the property to Harris. His declaration constitutes evidence of the intent of his principal, Winkelman, to convey Winkelman's interest in the disputed parcel subject only to an easement, yet the lower court concludes: "This assertion, of course, is speculative, and cannot itself be used to establish the intent of Winkelman." *See App. A-18.*

Nothing about the Becker Declaration is speculative. It is affirmative and factual in its representations of facts, and thus, evidence. It is solid evidence of Winkelman's intent, or rather lack of intent to reserve the fee of the right-of-way for herself.

11. Indefeasible Title

Under RCW 64.04.030. Warranty Deeds Within the State of Washington, one must have indefeasible title to convey by warranty deed. The title to the right-of-way was clouded at the time of the Winkelman sale to Harris. Neither grantor, nor grantee, nor the title insurance company could act as though the easement of the right-of-way had been extinguished. The grantor, Winkelman, did not have indefeasible title to the right-of-way at the time of the sale to Harris. Hence, both parties had to treat their conveyance as though Burlington Northern could still assert a claim, of some type, to the right-of-way. In fact, BN asserted continuing rights to the property at the time of Winkelman's sale to Harris. *See # 8, App. H-3.* The railroad was also continuing to pay property taxes on the right-of-way, and it left a long trestle on the disputed property as well. Approximately one and a half years after abandonment, BN made an offer to sell Harris her portion of the right-of-way. *See App. I-4-5.* BN letter date July 14, 1986. BN did not disclaim its interest in the right-of-way until December 28, 1987, after it was compelled to do so by the quiet title law suit of Harris et al.

12. Termination of Easement: Necessity of re-entry by grantor

Since the federal courts have construed these railroad rights-of-way to be easements, what effect did the ICC certificate of abandonment have on the title to Winkelman's land? The answer is that the title was still encumbered by the right-of-way, post ICC abandonment notice, because easements can only be terminated by a legal action of the grantors against the grantee of the easement: quiet title, ejectment, obtainment of a disclaimer, quit claim, or action or notice of re-entry. See 136 ALR 316, #3. 19 Am Jur 489, Estates § 29: Necessity of re-entry by grantor.

> "If an estate is granted upon a condition subsequent (that is an easement for a specific purpose like a railroad right-of-way), the interest of the grantee or

his successors-in-interest does not terminate automatically upon breach of the condition, but continues in existence until the creator of the estate upon condition subsequent, or his successors exercise the power of termination, or as it is commonly spoken of in the cases, the right of re-entry for condition broken."

"The rule that a re-entry by the grantor in a deed conveying an estate subject to condition subsequent is necessary to revest in him the title to the land after a breach of the condition, is to some extent reflected in the decisions involving deeds for railroad purposes which create in the grantee an estate subject to condition subsequent. In *Jones v. Southern R. Co.* 1922; CCA 5th, 285 F 19, the Court stated that if the railroad's use of the strip of land were to cease, acting as a breach of the conditions subsequent, the TITLE WOULD NOT BE REVESTED IN THE GRANTORS BY MERE OPERATION OF LAW."

It follows that Winkelman's title did not vest free of the burden of the railroad right-of-way easement, upon the date of the ICC abandonment. The burden was passed with the legal subdivision to Harris who exercised her power of termination, or right to take action, right of re-entry for condition broken. Harris quiet titled the servient estate of the legal subdivision, and removed forever, the encumbrance of the right-of-way, by obtaining the Quiet Title Judgment.

13. Language of Exception Can Have Only One Meaning

Since it has been established that the encumbrance on the title still existed at the time of the warranty deed to Harris, the language of exception for the railroad right-of-way could have only one meaning – to except and reserve an easement for the railroad. It could not have had two meanings – also, to except and reserve the fee for grantor Winkelman. That would be impossible. Nor could it have been intended to reserve a fee for grantor Winkelman by itself by forgetting about the railroad's easement. Becker, author of the deed, confirms that

his allusion was solely to the railroad's continuing interest in the right-of-way. He was legally correct.

14. Floating Easement

As further evidence that Winkelman could not have excepted a fee in the right-of-way for herself, is the fact that upon the date of the ICC abandonment of the right-of-way, the easement became a floating easement, similar to the one that Sam Wilkeson, Jr. received on the title to his land with the deed from Northern Pacific Railroad. The right-of-way had not been fixated to the ground, nor was it until about ten years later. But the floating easement remained on the title to his land, and it was real, albeit, amorphous. Since a floating easement has no definitive boundaries, and cannot be surveyed, the exception of the right-of-way in the Harris deed is not a strip of land in fee, but a floating burden on the title, which cannot be attached to the realty of the land.

15. Insufficient Language of Reservation

Winkelman's claim that the language of reservation intended to except a fee for herself is also refutable on the grounds that it is inappropriate and insufficient. Many court opinions have ruled that language of reservation must be specific and clear. In this case the exception is for Burlington Northern Railroad, no mention is made of Winkelman, her heirs, or any other entity than the railroad itself. Therefore, the exception and reservation can only be for the interest of the railroad, as author of the language has testified under oath. *Barker v. Lashbrook*, 128 Kan. 595, 279 P.12 (1929).

16. Court Opinion on the Effect of Abandonment on the Fee of the Servient Estate

Some courts have delved into the effect of the act of abandonment of a railroad on the fee of the servient estate: *Federal Farm Mortgage Corporation v. Smith*, 149 Kan. 789, 89 P.2d 838 (1939). A mortgage company sued to foreclose a mortgage on a tract of land along one side of which a strip

had been condemned for railway right-of-way purposes *prior* to the execution of the mortgage. The court held that, although the right-of-way strip had been excepted for right-of-way in the original mortgage agreement, and then the land was abandoned for railway purposes prior to foreclosure, the foreclosing morgage included the strip, explaining:

> "The ultimate title to land subjected to railway purposes does not cease to be in the owner of the adjacent freehold from which it was derived, and the termination of its use for railway purposes has no effect upon the fee title. It merely relieves the underlying fee of the dominant estate which had been held by the railway company so long as it was used for railway purposes."

In the *Federal Farm Mortgage* case, the landowner, mortgagee, attempted to except the fee of the land to the right-of-way, for himself, because it was excepted from the wording of the mortgage contract which he signed. Since the court considered the right-of-way to be an easement, it also considered the right-of-way to be an integral part of the moiety of the land – and therefore, no fee could be excepted from the foreclosure, even though it occurred *after* abandonment.

This illustrates how the legal subdivision of parcel 1-003, was passed to Harris, encumbered by the right-of-way, and that regardless of any action by the ICC abandonment, the title to the legal subdivision remained unaffected, but transferred in tact, and encumbered by the floating easement of the right-of-way. Harris then terminated the easement in default action, and the parcel was hers, unencumbered.

17. Title Remains in the Holder of Servient Estate

In *Brown v. Weare*, 152 S.W.2d 649, the Missouri Supreme Court, Division 1, in 1941, determined that no title passes in the grant of an easement, but the title rests and continues in the holder of the servient estate, so that when the easement ceases, there is no reversion of the title, but rather the servient estate is merely freed from the burden of the use granted, and any "reversion" is merely that of the use. This

decision is coincident with *Federal Farm Mortgage v. Smith*, supra.

The *Brown v. Weare* decision also reflected that a plaintiff in an action to quiet title must prevail upon the validity of his own title, not upon defects in the title of his adversary. In this dispute Ski Park relies solely on the quit claim deed from Winkelman out of which has already been extracted the Harris quieted portion of the right-of-way, within the legal subdivision which Harris purchased. Ski Park received no interest in the disputed land from Winkelman, because it had already been conveyed as part of the moiety of Parcel # 1-003 to Harris.

18. Lower Courts Misconstrue Prior Decisions

Both the State Court of Appeals decision and the State Supreme Court decision rely on two cases cited by Ski Park in an attempt to prove an exception for a right-of-way is a fee – not an easement. *Biles v. Tacoma O. & G.H.R.R.*, 5 Wash. 509, 32 P.211 (1893) refers to a dispute over the same type of land grant railroad right-of-way given to the Northern Pacific Railroad by the Act of 1864. The court determined that the right-of-way was an easement, and that a fee was not excepted from the deed, the owner of the legal subdivision was also the owner of the land involved, this being a dispute between the owner of the servient estate and the railroad, which was attempting to make a conveyance for another unchartered branch line upon the servient estate. The railroad was prevented from doing so.

The court in *Bile* also determined that the right-of-way was a floating easement, when the right-of-way was granted, so it could not have excepted the fee of a strip of land. A proper analysis of the *Bile* case is that it serves to confirm Harris' contention that the right-of-way was an easement before, during and after the date of abandonment, until it was terminated by the quiet title action of Harris.

Ski Park cites *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P.225 (1915), and heavy reliance is given by the Washington State Court of Appeals and the Washington Supreme

Court. Ski Park seeks to imply that an "exception" withdraws something from the operation of a deed that would have passed otherwise with the conveyance – and that the exception and reservation of the Harris warranty deed, inherently prevent Harris from obtaining the entire fee interest in the property conveyed.

The response to this is that the historical language of exception in the chain of title from Sam Wilkeson, Jr. through to Sabin, to Winkelman and to Harris, did not except the fee in the right-of-way but reserved a right to operate a railroad on the premises. In the *Studebaker* case, which involved a donation land claim in which a right-of-way easement was granted by Studebaker to a railroad, the language of reservation was both specific and appropriate:

> "Reserving always the fee simple to said lands and premises; it being understood that the use of the land for said railroad purpose is all that is conveyed by this instrument."

This language does not correspond in any respect to the language of exception for the railroad easement in the Harris warranty deed.

Professor William B. Stoebuck, University of Washington School of Law, analyzes the decision of *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 844 P.2d 1006 (2/11/93), "On the meaning of language in railroad's deed – though some Washington decisions have held similar language creates only an easement, in this case parties' intent was to except fee simple – which Winkelman then conveyed to Ski Park. The decision should be compared to earlier decisions, especially *Veach v. Culp*, 92 Wn.2d 570, 579 P.d 526 (1979) and *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199 (1959). There may be some inconsistency here." (Washington State Bar News, May, 1993, Page 22).

Winkelman had no power to unilaterally terminate the easement of the railroad and convert it into an exception of the fee of the right-of-way for herself, without proper court action. In *Russell v. Martin*, 88 So.2d 315 (1956) it was determined that "Unless an easement is for a fixed period of time, the easement is not revocable by the grantor." The

easement remains, until it is terminated in an appropriate manner.

19. Summary

A phrase worth remembering appeared in the *Hilt v. Weber* opinion (252 Mich. 198, 233 N.W. 159, 167, 71 A.L.R. 1238 (1930)):

> "Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong, and continuing injustice results from it, the duty of the court to correct the error is plain."

Based on the foregoing facts, parol and extrinsic evidence, state and federal case law, this Petition for Writ of Certiorari should be granted, and the Court should summarily reverse on the grounds that Petitioner Harris possesses property rights which vested in her pursuant to 42 Statute 414, U.S.C., Title 43 Section 912.

CONCLUSION

We respectfully request that this court accept the Petition for Writ of Certiorari for reasons which include the following:

1. The decision in the lower court jeopardizes the private property rights of numerous citizens who have legitimate reversionary interests in portions of abandoned railroad rights-of-way pursuant to 43 U.S.C. 912.

2. The decision in the court below does not conform with the opinion of federal courts that railroad rights-of-way are easements of special purpose and not fee simple strips of land.

3. The lower court decision does not recognize that a railroad must disclaim, quitclaim, or default on its interest in an abandoned railroad right-of-way for title of the servient estate to vest free of the encumbrance of the right-of-way.

4. The lower court's decision does not recognize that the issuance of a certificate of abandonment by the Interstate

Commerce Commission does not trigger an instantaneous termination of the easement of the right-of-way on the title of the servient estate.

5. The court below failed to give proper weight to the evidence at hand: The Declaration of Becker, the agent of the grantor, stated that he was never given instructions to withhold the fee when he drafted the language of the warranty deed, and that if he had been so ordered, he would have used different language.

6. The lower court issued an opinion on the intent of the grantee, when her certified signed declaration testifying to her intent was not sent to the lower court when the Clerk of the Pierce County Court had been given orders to do so. Rather, an unsigned statement was sent, which the court refused to consider. Petitioner Harris was, thereby, deprived of "equal protection of the law", the right to testify on her own behalf and have her declaration weighed by the court, as other parties had theirs weighed. This violates Amendment 13 of the United States Constitution. Section 1. Civil rights: . . . "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (The lower court had the liberty to reconsider, after it was sent the certified declaration of the Petitioner.)

7. The lower court's decision has equated the act of railroad abandonment with the title to the servient estate vesting free of the encumbrance of the easement.

8. The lower court failed to recognize that encumbrances to warranty deeds are legal and binding on both grantor and grantee: both grantor and grantee had accepted the lis pendens to quiet title to certain portions of the abandoned Burlington Northern Railroad right-of-way and this encumbrance became legal and valid, pursuant to RCW 64.04.010. Washington State law: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed" . . . made in accordance with the provisions of this section are hereby declared to be legal and valid."

9. There is a conflict between the federal courts as to what constitutes an abandonment:

The U.S. District Court, South Dakota, N.D., in *City of Aberdeen v. Chicago and North Western Transportation Co.*, 602 F. Supp. 589 (1984) determined that once a railroad ceases using right-of-way for railroad purposes, the easement disappears and the underlying landowner has use of the property he already owns. The implication of this opinion is that title to the servient estate vests free immediately of the burden of the easement.

The opinion of the U.S. District Court, Idaho (1985) in *State of Idaho v. Oregon Short Line Railroad Company*, 617 F. Supp. 213 (D.C. Idaho 1985), conflicts with the previous decision. This opinion stated that for an abandonment to occur the following must first occur:

a. The railroads must cease paying taxes.
b. The railroads must take up the tracks and other railroad structures or make the line unusable.
c. The railroads must have the intent to abandon – as evidenced by statements and conduct.
d. The railroads must cease using the line for any railroad purposes.
e. This court or Congress must decree that abandonment has occurred.

This latter opinion imposes many conditions on the perfection of the act of abandonment.

In the disputed case, the railroad continued to pay taxes on the entire right-of-way. The railroad made no disclaimer of its interest in the right-of-way until it was compelled to do so by Petitioner Harris in the quiet title action of December 31, 1987. The railroad left ten trestles in place, one on the disputed property. So, based on this federal court decision, the abandonment of the right-of-way had not been perfected on October 29, 1987, the date of the warranty deed to Petitioner Harris. The conflict between these federal decisions on railroad abandonment needs to be resolved by this Court.

10. The decision in the lower court does not recognize that language of reservation for the grantor must be sufficient

to reserve a fee interest to the grantor, at any time, either pre-abandonment or post-abandonment, when no quiet title action, nor disclaimer of interest by the railroad has been legally recorded.

11. The decision of the lower court does not recognize that the phrase "excepting railroad right-of-way" in a chain of title which means excepting an easement before the date of abandonment, cannot be construed as excepting a fee for the grantor, after the date of abandonment, when the grantor has taken no action to quiet title, eject, re-enter or clear title to the servient estate.

12. The decision of the lower court does not recognize that claimants/owners of abandoned portions of federal land grant railroad rights-of-way pursuant to 42 Stat. 414, U.S.C. Title 43, Sec. 912, must also take legal action to quiet title, re-enter, or eject in an appropriate court of law for title to vest free of the encumbrance of the right-of-way.

13. The decision of the lower court does not recognize that to convey by warranty deed, a grantor must have indefeasible title to an estate. The issuance of a certificate of abandonment by the Interstate Commerce Commission does not alone vest indefeasible title in the servient estate.

14. The decision of the lower court fails to recognize that 42 Stat. 414, U.S.C. Title 43, Sec. 912, Disposition of Abandoned Railroad Rights of Way, requires, by implication, that the railroad must be formally notified, and become a party to a quiet title action, so that any conveyance or covenant which was established on the right-of-way during the tenure of the railroad, can be legally established and protected.

15. The opinion of the lower court fails to recognize that Section 3, Land Grant Act of 1864, railroad rights-of-way are currently construed by federal courts to be easements rather than limited fees with an implied condition of reverter.

DATED this 7th day of September, 1993.

Respectfully submitted,

DANIEL J. OEHLER

Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARY E. HARRIS.	)	Number 58600-4
Petitioner.	)	En Banc
v.	)	Filed Feb 11, 1993
SKI PARKS FARMS, INC.,	)	
Respondent.	)	

SMITH, J. – Petitioner Mary E. Harris asks for review of a decision of the court of Appeals reversing the trial court's summary judgment which quieted title in petitioner to a parcel of property burdened with a railroad right of way. The Court of Appeals remanded to the Superior Court with instructions to enter summary judgment quieting title in Respondent Ski Parks Farms, Inc. We granted review and affirm the Court of Appeals.

The single issue before the court in this case is whether the Court of Appeals erred in granting summary judgment in favor of Respondent Ski Park Farms, Inc., and ruling that a statutory warranty deed from its predecessor in title, Winkelman, to Petitioner Harris reserved or excepted a fee interest, and not merely an easement, in the abandoned railroad right of way property.

On July 2, 1864, pursuant to the 1864 Land Grant Act,[1] Northern Pacific Railroad Company (Northern Pacific) acquired ownership to a parcel of land described

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[1] Land Grant Act of 1864, 13 Stat. 365.

in the original handwritten conveyance as "the East half of the North East quarter of section twenty-seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian."[2] Petitioner Harris in her brief refers to the property as the "southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E."[3] On August 12, 1876, the Northern Pacific Railroad Company, by deed, conveyed certain property in Pierce County to Samuel Wilkeson, Jr. The deed included the legal description of the disputed property and contained an exception as follows:

> [The] East half of the North East quarter of section twenty seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian. . . .
>
> [R]eserving and excepting, however, from the above described premises *a strip of land two hundred feet wide, extending through the same on the line of the railroad* of the said Northern Pacific Railroad Company or on the line of any of its branches, *to be used for a right of way,* or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises, (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress, approved the second day of July 1864, and included in the

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[2] Clerk's Papers, at 182.

[3] Brief of Petitioner, at 4. This is consistent with the legal description in the title report dated November 10, 1987. Clerk's Papers, at 255.

> aforesaid mortgage,) together with all and singular, the improvements waters, water courses rights, liberties, privileges, herditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents issues and profits thereof and all the estate, rights title interest, profits claim and demand whatsoever, of them the parties of the first and second parts in law equity or otherwise, howsoever of in and to the same and every part thereof. . . . [4]

(Italics ours.)

The trial court in its order granting summary judgment[5] and the Court of Appeals in its opinion[6] use the same legal description used by appellant and substantially the same language of the exception. However, the tax deed relied upon by Petitioner Harris identifies the property as "[t]hat portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record."[7]

Subsequent conveyances of the parcel passed the property from Hiram O. and Ethel E. Sabin to John J. and

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[4] Clerk's Papers, at 182. The language is transcribed from a copy of the original handwritten deed included in the Clerk's Papers, the original of which is on file in volume 5 of Deeds, Pierce County, at 351-54.

[5] Clerk's Papers, at 346.

[6] Harris v. Ski Park Farms, Inc., 62 Wn. App. 371, 814 P.2d 684 (1991).

[7] Clerk's Papers, at 84.

Opel V. Winkelman on May 10, 1946.[8] The warranty deed contained the following legal description:

> [T]he northeast quarter of southeast quarter, and that part of the southeast quarter of northeast quarter of Section Twenty-seven (27), Township Nineteen (19) North, Range Five (5) East of the Willamette Meridian, lying east of the South Prairie Creek:
>
> *EXCEPT the right of way of the Northern Pacific Railway Company* . . . and EXCEPT tracts appropriated by Northern Pacific Railway Company in Cause No. 74807 . . . and Pierce County in . . . Cause No. 44906.[9]

(Italics ours.) Petitioner Harris acquired the property by a tax deed dated December 20, 1983, from the Pierce County Assessor-Treasurer. That deed described the property as:[10]

> Parcel No. 05-19-27-1-006
>
> That portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record.

Burlington Northern Railroad Company (Burlington Northern) acquired Northern Pacific's interest in the right

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[8] Clerk's Papers, at 200. The record does not indicate intervening conveyances prior to Sabin's conveyance to Winkelman.

[9] Clerk's Papers, at 303.

[10] Clerk's papers, at 84.

of way.[11] On December 7, 1984, the Interstate Commerce Commission authorized Burlington Northern to abandon the right of way. It was abandoned by Burlington Northern on February 15, 1985,[12] pursuant to 43 U.S.C. § 912, which provides:

> Whenever public lands of the United States have been . . . granted to any railroad company for use as a right of way for its railroad . . . and use and occupancy of said lands for such purposes has ceased . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon, all right, title, interest, and estate of the United States in said lands shall . . . . be transferred to and vested in any person . . . to whom . . . title of the United States may have been . . . granted, *conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad- . . . without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever.* . . . [13]

At the time of abandonment, Ms. Opel V. Winkelman and the Winkelman Family Trust (Winkelman) held title to the land subject to the right of way. Although Winkelman was not aware that the right of way had been abandoned, pursuant to 43 U.S.C. § 912 title to the right of way vested in Winkelman upon its abandonment.

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[11] Clerk's Papers, at 22. The record does not indicate the date of this acquisition.

[12] Clerk's Papers, at 248.

[13] (Italics ours.) 43 U.S.C. § 912.

On April 23, 1987, Winkelman by real estate contract conveyed 60 acres of the parcel (Lot 6) to Ski Park Farms (Ski Park) for $143,500.[14] On July 24, 1987, Ms. Mary E. Harris (Harris) entered into a purchase and sale agreement with Winkelman for two parcels of the property, one of which was bisected by the right of way. The sale price was $7,000. Ms. Harris prepared the legal description of the property for the purchase and sale agreement, signed by Winkelman, which included the following description:[15]

> All of that portion of tax parcel #05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement*.
>
> All of that portion of tax parcel #05-19-26-2-007 lying between the South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific railroad right-of-way easement*.

(Italics ours.)

The sale to Ms. Harris closed on October 29, 1987. The closing documents, including the deed and preliminary title insurance, were reviewed by Ms. Harris and her

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[14] Clerk's Papers, at 201. The contract reserved "a 30 foot non-exclusive easement for ingress, egress and utilities. . . ." The document in the file is not signed, but a declaration asserts that the transaction was executed. That assertion is not contested. Clerk's Papers, at 216.

[15] Clerk's Papers, at 245. The document referred to a sketch which was attached.

attorney prior to closing. The statutory warranty deed included the following descriptions:

> PARCEL A:
>
> That portion of the West Half of the Northwest quarter of section 26, Township 19, North range 5 East, Willamette Meridian, Pierce County, Washington lying, Southeasterly of South Prairie Creek and Northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (Formerly Northern Pacific) Railway Company.*
>
> PARCEL B:
>
> That portion of the Southeast Quarter of the Northeast Quarter of Section 27, Township 19, North Range 5 East of the Willamette Meridian. Pierce County, Washington, which lies Southeasterly of the Southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company.*[16]
>
> Situate in Pierce County, Washington.
>
> SUBJECT TO Easements. Restrictions, Reservations, Conditions, and Provisions of record.

(Italics ours.)

On February 24, 1988, Winkelman by quitclaim deed conveyed its interest in the right of way to Ski Park,

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[16] Clerk's Papers, at 207, 255.

reserving to Winkelman "a 30 foot non-exclusive easement for ingress[,] egress and utilities. . . . "[17] The deed conveyed:

> That portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillan to Buckley, Washington Branch Line right-of-way, now abandoned, located upon, over and across section 27, Township 19 North Range 5 East, W.M., described as follows:
>
> All that portion of said Railroad Company's 400 foot wide Branch Line right-of-way being 200 feet on each side of said Main Track centerline in the North half of the Southeast quarter of said Section 27, lying Northerly of the West production of the South line of Lot 6 of Survey No. 8701200255, recorded January 2, 1987, and South of the North line of said North half of the Southeast quarter of said Section 27.
>
> Also all that portion of said Railroad Company's 200 foot wide Branch Line right-of-way being 100 feet on each side of said Main Tract centerline in the Southeast quarter of the Northeast quarter of said Section 27, lying North of the south line of said Southeast quarter of the Northeast quarter of said Section 27, and lying South of North line of said Southeast quarter of the Northeast quarter of said Section 27.
>
> Additional Terms and conditions: see schedule A, attached.
>
> . . . .

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[17] Clerk's Papers, at 212-13.

SCHEDULE A

EASEMENT AND RESERVATION

The sellers herein further *RESERVE* unto themselves, their heirs, successors and assigns a 30 foot non-exclusive easement for ingress[,] egress and utilities along the south line of which is the West Production of the South line of lot 6 of survey No. 8701200255, for the benefit of Lots 4 and 5 of said survey and each and every subdivision thereof.

Said easement may also be conveyed by the sellers herein to each and every lot owner between the Carbon River and the South line of Lot 6 of said survey or any future reciprocal easement agreements.

On March 10, 1988, in a third amended complaint, Petitioner Harris brought an action against Ski Park to quiet title to the right of way property.[18] Ski Park filed a motion for summary judgment and Ms. Harris filed a cross motion for summary judgment to quiet title. On July 5, 1988, Judge E. Albert Morrison, Pierce County Superior Court, denied both motions, concluding that the matter presented factual questions which could not be resolved on summary judgment.[19] Both parties filed motions for reconsideration. On July 22, 1988, the court

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[18] Clerk's Papers, at 135. Petitioner Harris and 39 other plaintiffs (Citizens Against the Trail) initially filed a quiet title action on February 20, 1987. Ski Park was joined as a defendant with an interest in the subject property. Since the claims between Ms. Harris and Ski Park were unlike the claims of the other parties, the trial court bifurcated the action. Only Petitioner Harris is a party before this court. Clerk's Papers, at 173.

[19] Report of Proceedings, at 64.

heard the motions. At that time, counsel for both parties agreed that all material facts in the case were before the court.[20]

The trial court later on September 7, 1988, granted summary judgment quieting title in Petitioner Harris.[21] The court considered the declarations of several persons. Clark R. McGowan (McGowan), a real estate broker, was Winkelman's representative in the sale. He declared that no verbal or written representation was made to convey the right of way to Harris and that the exception language clearly showed intent not to convey the right of way.[22] McGowan employed John Becker (Becker), a professional land surveyor, to draft the legal description in the deed. Becker declared that Winkelman expressed no intention to reserve a fee interest in the right of way, that the exception language was to recognize that Burlington Northern had and might still have an interest in the right of way, and that if he had been instructed to prepare a deed that reserved a fee interest in the right of way, he would not have used the language that appears in the deed.[23]

The declaration of Winkelman stated that it would not have quitclaimed the right of way to Ski Park if it believed the property had already been conveyed to Ms. Harris and that it did not sell any ownership rights to the

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[20] Report of Proceedings, at 108.

[21] Clerk's Papers, at 344.

[22] Clerk's Papers, at 259.

[23] Clerk's Papers, at 266.

right of way property to her.[24] However, Ms.Harris in an unsigned declaration asserted that it was her intention to acquire a fee interest in the property formerly subject to the right of way, and that it was her understanding that she was acquiring the underlying fee in the right of way from Winkelman.[25] We can give no credence to the declaration because it was not signed and contained the notation "Original to be filed when signature obtained".[26] The record before us does not contain the signed document.

The parties stipulated before the trial court that there were no facts material to resolution of the motions for summary judgment which were not before the court.[27]

On appeal, the Court of Appeals, Division Two, reversed the trial court and quieted title in Ski Park. The court held that in the conveyance to Petitioner Harris, Winkelman intended to "reserve whatever interest in the right of way they owned." The court noted that "[a]lthough not known to Winkelman, the right of way had been abandoned and Winkelman now owned all interest in the property where the right-of-way had previously existed." It further stated that "[i]f the conveyance to Harris was intended to transfer the property where the

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[24] Clerk's Papers, at 216.

[25] Clerk's Papers, at 261.

[26] Clerk's Papers, at 265.

[27] Report of Proceedings, at 96, 97, 99, 108.

right of way had existed, the exception language was superfluous."[28] The court concluded that:[29]

> [W]inkelman intended to reserve the property where the abandoned right of way traversed the quarter sections Winkelman conveyed to Harris. The later conveyance from Winkelman to Ski Park vested title to the abandoned right of way property in Ski Park. The court erred in quieting title to the abandoned right of way property in Harris.

The court then remanded to the trial court with instructions to enter summary judgment quieting title in Ski Park "to that disputed portion of the abandoned right of way property described in Winkelman's quitclaim deed to Ski Park Farms, Inc."

On December 3, 1991, this court granted review.

Petitioner Harris claims that she acquired from Winkelman a fee interest in the right of way. She acknowledges that the 1987 warranty deed from Winkelman to her contains the clause "excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company." However, she contends that this excepts merely an easement and not the underlying fee interest. She further contends that abandonment of the right of way by Burlington Northern in 1985 by operation of law resulted in her acquisition of the fee interest in the right of way. Ski Park claims a fee interest in the right of way

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[28] *Harris v. Ski Park Farms, Inc.*, 62 Wn. App. 371, 377, 814 P.2d 684 (1991).

[29] *Harris*, at 377.

through its 1988 quitclaim deed from Winkelman. It contends that the exception in the warranty deed from Winkelman to Harris excepted a fee interest in the right of way; and that the subsequent quitclaim deed from Winkelman to Ski Park thus gave Ski Park the fee interest in the right of way.

Summary judgment is appropriate "if the pleadings, depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[30] A material fact is one upon which the outcome of the litigation depends.[31] The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.[32] On review of summary judgment an appellate court engages in the same inquiry as the trial court.[33]

The term "right of way" may mean a "mere right of passage over a tract, and sometimes to describe the strip of land which railroad companies purchase, or otherwise compulsorily acquire, upon which to construct their

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[30] CR 56(c).

[31] *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

[32] *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

[33] *Marincovich v. Tarabochia*, 114 Wn.2d 271, 787 P.2d 562 (1990).

railroad."[34] The term "easement" means a "right, distinct from ownership, to use in some way the land of another, without compensation."[35]

"A conveyance of a right-of-way to a railroad may be either in fee simple or may be an easement only."[36] "The interpretation of such a deed to determine its effect is a mixed question of fact and law. It is a factual question to determine the intent of the parties. Then we must apply the rules of law to determine the legal consequences of that intent."[37]

This court in *Morsbach v. Thurston County* stated that a railroad right of way is more than an easement.[38] But that statement was clarified in *Swan v. O'Leary,* which stated that the intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case.[39] In determining the intent of the parties, courts have considered whether the consideration was substantial or nominal, whether the deed conveyed a strip or tract of land and limited its use to a specific purpose, whether the deed contained a habendum clause, and whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would

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[34] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 568, 278 P. 686 (1929).

[35] *Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986).

[36] *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

[37] *Veach*, at 573.

[38] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 278 P. 686 (1929).

[39] *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199 (1950).

revert to the grantor.[40] When the granting clause of a deed conveys a right of way to a railroad, this court has usually concluded that the deed passes an *easement* and not a *fee with a restricted use:*

> [I]t is clear that we adopted the rule that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.[41]

In *Veach v. Culp,*[42] the court reiterated the "well established principle", that "we must look to the actual use being made of . . . [the] easement in light of the rule that the servient owner retains the use of the easement so long as that use does not materially interfere with the use by the holder of the easement."[43] The plaintiffs in that case sought removal of a chain link fence blocking their access along a railroad right of way which crossed their property. The railroad made minimal use of it track. The court concluded that because of the railroad's limited use of the easement, the plaintiffs, as holders of the subservient estate, were entitled to use the right of way in such a manner that it would not materially interfere with the railroad's use of it.

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[40] *Swan v. O'Leary, supra.*

[41] *Veach v. Culp,* 92 Wn.2d 570, 574, 599 P.2d 526 (1979) (quoting *Swan v. O'Leary, supra*). *See King Cy. v. Squire Inv. Co.,* 59 Wn. App. 888, 801 P.2d 1022 (1990) (Washington cases show a strong tendency to consider such rights of way as easements).

[42] 92 Wn.2d 570, 599 P.2d 526 (1979).

[43] *Veach,* at 575.

Both Petitioner Harris and Ski Park agree that this case involves an interpretation of deeds problem. The interpretation of a right of way deed is a mixed question of fact and law.[44] A court should construe a deed grant in a manner which gives effect to the intent of the parties.[45] The intent of the parties is to be derived from the entire instrument and, if ambiguity exists, the situation and circumstances of the parties at the time of the grant are to be considered.[46]

Since both Harris and Ski Park filed motions for summary judgment, the facts must be reviewed in the light most favorable to the nonmoving party in considering each motion.

I

Ski Park Motion For Summary Judgment

Ski Park argues that in the grant from Winkelman to Ms. Harris, it was the parties' intent to except a fee interest in the right of way and not merely an easement and that Winkelman therefore subsequently quitclaimed to Ski Park a fee interest in the right of way. In support of its position. Ski Park argues (1) that the terms "excepting" and "right of way" except a fee interest, (2) that because Winkelman owned the right of way in fee at the time of the grant to Ms. Harris, the deed excepted a fee interest, and (3) that the doctrine of merger prevents use

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[44] *Veach v. Culp, supra; Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986).

[45] *Zobrist v. Culp*, 95 Wn.2d 556, 627 P.2d 1308 (1981).

[46] *Zobrist*.

of the purchase and sale agreement to interpret an ambiguity in the deed.

Ski Park cites an early case to define the term "exception" as a "clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description [and] [t]he part excepted is in existence at the time of the grant, and remains . . . unaffected by the conveyance."[47] Using this definition, it argues that use of the term "excepting" necessarily prevents the grantee, Ms. Harris, from obtaining the entire fee interest in the property conveyed because Northern Pacific reserved a right of way, within its ordinary meaning, and because, before signing, Ms. Harris and her attorney reviewed the closing documents which made no reference to an easement.

An easement is a burden on the land and an interest in land.[48] The term "excepting" arguably could have been used by the parties to express their understanding that, although Ms. Harris was receiving a fee interest, her rights were not plenary, but subject to an easement. This would be consistent with Ms. Harris' assertion that she thought the deed was excepting only an easement and that she was in fact acquiring the underlying fee to the

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[47] *Biles v. Tacoma, O. & G.H.R.R.*, 5 Wash. 509, 32 P. 211 (1893). *See also Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915).

[48] *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1989) (an easement is an interest in land within the purview of the conveyance statute).

railroad right of way, but this assertion is not properly before us.[49]

The deed from Northern Pacific to Wilkeson did not explicitly reserve a fee. The right of way thus arguably could be considered as either a fee interest or simply an easement. The deed description of the right of way ("a strip of land two hundred feet wide") and its purpose ("to be used for a right of way, or for other railroad purposes") would ordinarily create an easement only and not a fee simple interest.[50] This is inconsistent with Ski Park's arguments that Northern Pacific reserved a fee and that the common meaning of a right of way is a fee interest. Similarly, the fact that Ms. Harris and her attorney reviewed the closing documents and did not object to lack of reference to an easement does not necessarily support Ski Park's conclusion that a fee was excepted. Further, the deed was prepared by Winkelman's agent. Becker, who stated that if he had been instructed to reserve a fee interest, he would not have used the language used in the deed. This assertion, of course, is speculation and cannot of itself be used to establish the intent of Winkelman.

Burlington Northern abandoned the right of way in 1985, 2 years prior to Winkelman's conveyance to Ms. Harris. Ski Park argues that if the exception clause is interpreted as withholding only an easement, nothing would be withheld because the right of way no longer

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[49] Clerk's Papers, at 265. We cannot consider this assertion because it is contained only in an unsigned declaration.

[50] *Veach*, at 574.

existed and Winkelman held the entire parcel in fee at the time it conveyed to Harris. The Court of Appeals, in granting summary judgment in favor of Ski Park, also focused on abandonment of the right of way. The Court of Appeals concluded that since the right of way was no longer in existence. Winkelman intended to reserve in fee the property where the right of way once existed. The court stated that its conclusion as to Winkelman's intent was necessary because to hold otherwise would make the exception language "superfluous". However, that language would be superfluous only if Winkelman intended to except an easement knowing that an easement no longer existed. Since Winkelman did not know of the abandonment (and the resulting fee interest), it cannot be said with certainty that it intended to reserve the fee interest in the right of way. This court has held that the intent of the parties must prevail. The real estate contract between Winkelman and Ski Park dated April 23, 1987, which antedates the October 29, 1987, statutory warranty deed to Petitioner Harris, at least provides some support to a conclusion that Winkelman intended to reserve a fee interest in the railroad right of way, notwithstanding the confusion created by the language in the purchase and sale agreement prepared by Petitioner Harris.

Ski Park finally argues that, under the doctrine of merger, the purchase and sale agreement merged into the deed. The trial court, in granting summary judgment in favor of Ms. Harris, relied on the language of the purchase and sale agreement. However, the Court of Appeals held that the purchase and sale agreement was not controlling because it merged into the deed. Both Ski Park and the Court of Appeals rely on *Black v. Evergreen Land*

Developers.[51] However, that case recognized that there were exceptions to the merger doctrine. This court has held that where the intent of the parties is not clearly expressed in the deed, courts may consider parole evidence.[52] in order to determine the intent of the parties, extrinsic evidence is admissible as to the entire circumstances under which a contract is made.[53]

This court has adopted the "context rule" which succinctly stated is that "extrinsic evidence is admissible as to the entire circumstances under which [a] contract [is] made, as an aid in ascertaining the parties' intent", specifically adopting the Restatement (Second) of Contracts §§ 212, 214(c) (1981).[54]

This court in *Berg v. Hudesman*[55] rejected "the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible" and overruled cases to the contrary.[56]

The purchase and sale agreement in this case may be considered as some evidence of the circumstances of the parties at the time of the grant. Even considering, in the light most favorable to Ms. Harris, that both Winkelman and Harris signed the purchase and sale agreement, a conclusion that the parties intended to except only an

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[51] 75 Wn.2d 241, 450 P.2d 470 (1969).

[52] *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 269, 714 P.2d 1170 (1986).

[53] *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

[54] *Berg*, at 667, 668.

[55] 115 Wn.2d 657, 801 P.2d 222 (1990).

[56] *Berg*, at 669.

easement and not a fee interest ("excepting the Northern Pacific railroad right of way easement") is tenuous, at best.

Applying the rules on summary judgment, the undisputed facts in this case and the law favor summary judgment for Respondent Ski Park Farms.

II

Harris Motion For Summary Judgment

Petitioner Harris' position is that the deed excepted only an easement and since the easement was extinguished by the abandonment, she acquired a fee interest in the entire parcel. She argues that the parties intended to except an easement and not a fee interest in the right of way and that an ambiguous deed should be interpreted in favor of the grantee. She further contends that the Court of Appeals erred in granting summary judgment in favor of Ski Park by concluding that the right of way had been abandoned when Winkelman did not even know of the abandonment at the time it granted the property to her.

To support her position that the parties intended to except an easement, petitioner argues that she used the term "easement" in the purchase and sale agreement, which was signed by Winkelman; that the phrase "railroad right of way" historically reserved an easement; and the language in the deed reflects the historical interpretation of the phrase. She further argues that her quiet title action was known to Winkelman and that was evidence that both parties knew that Harris intended to acquire the fee interest in the right of way. She also claims that

because Winkelman did not know of abandonment of the right of way by the railroad, it could not have intended to except a fee interest it did not know it had. Any facts relating to the intent of the parties must be obtained from sources other than Petitioner Harris. Her declaration is unsigned and cannot be considered on the record before us.

Use of the term "easement" in the purchase and sale agreement and the historical interpretation of the phrase "railroad right of way" may provide some indication of Ms. Harris' intent to except only an easement, but it does not lead to the same conclusion on Winkelman's intent. Winkelman has stated that it did not intend to transfer any ownership rights in the right of way to Ms. Harris. If Winkelman knew of her quiet title action, it may indicate some knowledge that Ms. Harris wanted a fee interest, but it does not indicate Winkelman's intent to convey a fee interest. McGowan, seller Winkelman's agent, stated that the sellers gave no indication of an intent to convey the right of way to Ms. Harris at closing or at any time in the future. Although Winkelman did not know the right of way had been abandoned and that it now held reversionary title to it, it meant to reserve under the exception whatever interest it had. Winkelman stated that its understanding of the exception language was that it excepted conveyance of the right of way regardless whether it was an easement or a fee interest. Therefore, viewing the facts in the light most favorable to Ski Park, it cannot be said that the one conclusion reasonable persons could reach is that the parties intended to convey only an easement and not a fee interest.

Petitioner Harris argues that the deed should be construed in favor of the grantee. She states that the facts supporting her contention are that the deed was prepared by Becker, grantor Winkelman's agent; that Becker stated that he was not told to withhold the fee in the conveyance; and Becker stated that if he had been so instructed, he would have used language different from that used in the deed.

While ambiguity in a deed is resolved against the grantor,[57] the intent of the parties is of paramount importance.[58] The statutory warranty deed dated October 29, 1987, is not ambiguous. Any ambiguity is created by the language of the July 24, 1987 purchase and sale agreement. Winkelman stated that it did not intend to sell any ownership rights in the right of way. Viewing this fact in the light most favorable to Ski Park, it is reasonable to conclude that Winkelman intended to except a fee interest in the property and not merely an easement.

Petitioner Harris further argues that because neither party knew the status of the right of way, there was no intent to act as if the right of way had been extinguished and held in fee by Winkelman. However, on the record in this case, Ms. Harris could have known that the right of way was held by Winkelman in fee. Ms. Harris initiated a quiet title action in February 1987, 8 months prior to closing her purchase from Winkelman. In her complaint, she acknowledged that Burlington Northern abandoned

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[57] *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 901, 792 P.2d 1254 (1990).

[58] *Swan*, at 535.

the right of way in 1985 and that upon abandonment, the right of way immediately vested in the original grantors or their successors. One may infer that she knew Winkelman held a fee interest in the right of way and she nevertheless agreed to the exception. Petitioner contends that Burlington Northern's claim to the right of way was unsettled at the time of the conveyance. The only support for her contention is a letter she received from the Pierce County Prosecuting Attorney in January 1987 which advised her that Burlington Northern had not abandoned its claim to ownership to the property. Although there is no clear evidence that she had actual knowledge of ownership, she might logically have insisted that Winkelman quitclaim the right of way to her if she intended to acquire the fee interest in the right of way. This she did not do. As to Winkelman's intent, it stated that it would not have quitclaimed the right of way to Ski Park if it believed that it had already conveyed the property to Ms. Harris. Subsequent acts of a party to a contract are admissible to assist in ascertaining intent.[59] Winkelman's subsequent quitclaim of the right of way to Ski Park, and its prior sale by real estate contract, is consistent with its intent to convey only an easement to Petitioner Harris.

We agree with the Court of Appeals that the trial court erred in granting summary judgment quieting title in Petitioner Harris and that summary judgment should be granted in favor of Respondent Ski Park Farms, Inc., quieting title in it.

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[59] *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973).

From the record in this case, we conclude that the reservation and exception granting a right of way to the Northern Pacific Railroad reserved and excepted a fee interest in the property; and that abandonment of the right of way by the railroad resulted in reversion to the owner of the property (Winkelman), who conveyed by statutory warranty deed a portion of the acreage to Petitioner Harris, reserving a fee interest in the railroad right of way, and conveying the remainder of its property interest by quitclaim deed to Respondent Ski Park Farms, Inc.

We affirm the Court of Appeals and remand the case to the trial court for entry of summary judgment and quiet title in favor of Respondent Ski Park Farms, Inc.

/s/ Smith, Charles

WE CONCUR:

/s/ Dore, C.J. (Fred)
/s/ Utter, Robert
/s/ Brachtenbach, J.
CONCURS IN RESULT ONLY
/s/ Dolliver, James
/s/ Andersen, James
/s/ Durham, J.
/s/ Guy, Richard
/s/ Johnson, Charles

APPENDIX B

THE SUPREME COURT OF WASHINGTON

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., Respondent.	)	No. 58600-4 ORDER DENYING MOTION FOR RECONSIDERATION (Filed June 8, 1993)

The Court having decided that the petitioner's motion for reconsideration be denied,

It is hereby ordered that the motion is denied.

Dated this 8th day of June, 1993.

/s/ James Andersen
Chief Justice

120 Wn.2d 727

APPENDIX C

THE SUPREME COURT OF WASHINGTON

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., Respondent.	**MANDATE** No. 58600-4 Pierce County No. 87-2-091090-8 C/A No. 12321-5-II

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Pierce County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on February 11, 1993, became the decision terminating review of this court in the above entitled cause on June 8, 1993. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed wavied [sic]. Order Denying Motion for Reconsideration was entered herein on June 8, 1993. Copy attached.

(seal) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 10th day of June, 1993.

/s/ C.J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

APPENDIX D

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARY E. HARRIS, a single woman, et al, Respondent, v. SKI PARK FARMS, INC., Appellant.	))))))))	No. 12321-5-II DIVISION TWO FILED: February 25, 1991

PETRICH, J. – Ski Park Farms, Inc. appeals from the trial court's ruling on cross motions for summary judgment[1] that the title to land consisting of an abandoned railroad right-of-way which adjoins Ski Park property should be quieted in Mary E. Harris. The issue is whether the owners of property over which an abandoned railroad right-of-way existed, relinquished their interest in the right-of-way by a conveyance which excepted the

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[1] Harris contends that the trial court resolved the issue based on stipulated facts by entering findings and conclusions. She thus argues that our task on review is simply to determine whether the findings are supported by the stipulation and whether the findings support the conclusions. She is mistaken. The trial court entered its order granting plaintiff's motion for summary judgment which designated the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. RAP 9. 12. No reference whatsoever was made to the findings and conclusions. The trial court's summary judgment order is now on review and, for our purposes, the trial court's findings and conclusions are superfluous. *Duckworth v. Bonney Lake*, 91 Wn. 2d 19, 21-22, 586 P.2d 860 (1978).

railroad right-of-way. We hold that by the exception of the railroad right-of-way from the conveyance, the owners retained their interest in the right-of-way property and we reverse the trial court's summary judgment.

On July 2, 1864, pursuant to the 1864 Land Grant Act, Northern Pacific Railroad Company acquired ownership of a parcel of land legally described as the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E., (the "property"). Approximately 10 years later, Northern Pacific conveyed the property to Sam Wilkeson, Jr., by warranty deed, reserving and excepting the disputed right-of-way property (the "right-of way") as follows:

> Reserving and excepting, however, from the above described premises, a strip of land two hundred feet wide, extending through the same on the line of the railroad of the said Northern Pacific Railroad Company or on the line of any of its branches to be used for a Right of way or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress approved the 2nd day of July, 1864, and included in the aforesaid mortgage).

Subsequent conveyances of the original parcel passed the property from Hiram Sabin to John and Opal Winkelman on May 10, 1946. The warranty deed from Sabin to Winkelman contained the following language of exception relating to the right-of-way:

> EXCEPT, the right of way of the Northern Pacific Railway Company . . . and except tracks appropriated by Northern Pacific Railway Company in Cause No. 74807 . . .

Burlington Northern Railroad Company acquired Northern Pacific's interest in the right-of-way as a successor-in-interest. On December 7, 1984, the Interstate Commerce Commission authorized the abandonment of the right-of-way, which was then abandoned on February 15, 1985 by Burlington Northern.

The abandonment operated to vest title in the property owners abutting the abandoned right-of-way, pursuant to 43 U.S.C. § 912. When Burlington Northern abandoned the right-of-way on February 15, 1985, Opal Winkelman, individually, and Opal Winkelman, Joan Nelson, and Mary Eytinge, as Trustees of the John C. Winkelman Family Trust (Winkelman), held fee title to the land completely surrounding and abutting the right-of-way. Thus, at the time of abandonment, title to the.right-of-way vested in Winkelman.

On April 23, 1987, Winkelman sold approximately 60 acres of the Property to Ski Park Farms, Inc. for $143,500. On July 24, 1987, Harris entered into a real estate purchase and sale agreement with Winkelman for the purchase of property located within two government quarter sections part of which was bisected by a railroad right-of-way thus resulting in three small parcels bounded by either roads, a creek, section lines or the right-of-way. The total sale price was $7,000. Harris, who drafted the legal description, included the following language: "excepting the Northern Pacific railroad right-of-way easement."

The sale closed on October 29, 1987. Prior to closing of the Harris purchase, the preliminary commitment for title insurance and all other closing documents, including the deed, were revealed both by Harris and by an attorney on her behalf. The title policy and the deed included the following exception: "excepting therefrom right-of-way of the Burlington Northern (Formerly Northern Pacific) Railway Company."

Then, on February 24, 1988, Winkelman, by quit claim deed, conveyed to Ski Park Farms, Inc. their fee interest in abandoned right-of-way adjacent to Ski Park. Harris asserts an ownership interest in the right-of-way which is some distance from and not contiguous to her properties.

In reviewing a summary judgment, this court engages in the same review as the trial court. *Del Guzzi Construction Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn. 2d 878, 719 P.2d 120 (1986). Summary judgment shall be granted if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Hontz v. State*, 105 Wn. 2d 302, 714 P.2d 1176 (1986).

The issue here is construction of the Winkelman to Harris deed. The construction of a deed generally is a matter of law for the court. *Donald v. Vancouver*, 43 Wn. App. 880, 719 P. 2d 666 (1986). In construing a deed, the intent of the parties controls; particular attention is paid to the intent of the grantor when giving meaning to the entire language of the deed. *Carr v. Burlington Northern*,

Inc., 23 Wn. App. 386, 597 P.2d 409 (1979). The intent must be ascertained from reading the deed as a whole. *McKillop v. Crown Zellerbach, Inc.*, 46 Wn. App. 870, 733 P. 2d 559, *review denied*, 108 Wn. 2d 1015 (1987). The words are to be given their ordinary meaning. 46 Wn. App. at 873. If the terms of the contract are plain and unambiguous, the meaning should be deduced from the language alone without resort to parol evidence. 46 Wn. App. at 873. *See also Petersen v. Schafer*, 42 Wn. App. 281, 709 P. 2d 813 (1985), *review denied*, 105 Wn.2d 1011 (1986).

Harris's position is that the exception in the deed applied only to a railroad easement over the property described, and that since the easement was abandoned, she then owned the fee interest in the property. She relies on the language in the purchase and sale agreement, which excepted "the Northern Pacific railroad right-of-way easement." Her reliance on the purchase and sale agreement is misplaced. Provisions of a real estate contract and sale agreement and all prior negotiations merge into the deed delivered and accepted in fulfillment of the earlier contact. *Black v. Evergreen Land Development, Inc.*, 75 Wn.2d 241, 248, 450 P. 2d 470 (1969). The fact that the term "easement" was eliminated from the deed suggests to us that the parties meant to except something more than an easement.

An exception in a deed is a clause that withdraws from its operation some part of the thing granted and which otherwise has passed to the grantee under the general description. *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915). At the time of the Harris conveyance, the railroad right-of-way had been abandoned and the

Winkelman interest included the fee interest in the property. If the conveyance to Harris was intended to transfer the right-of-way, the exception language was superfluous. The reference to the abandoned right-of-way in the Harris conveyance was simply a shorthand method of describing the property, without having to describe the conveyed property in metes and bounds. Finally, comparing the price paid by Harris with that paid by Ski Park, it is inconceivable that such a large tract, embracing the right-of-way in the quarter sections involved, was intended to be conveyed to Harris. While it is possible that a factual dispute exists as to whether Winkelman intended to convey to Harris the right-of-way area contiguous to the Harris tracts, it is clear that Winkelman did not intend to convey to her the right-of-way area contiguous the Ski Park property. Title to the area adjoining the Ski Park property is the only issue before us.

We are satisfied that the Winkelman to Harris conveyance was unambiguous and that Winkelman reserved the right-of-way property contiguous to the adjoining Ski Park property. The later conveyance from Winkelman to Ski Park vested in it the adjacent right-of-way property.

Reversed and remanded with instructions to enter summary judgment quieting title to the property within the right-of-way adjacent and adjoined to the Ski Park property in Ski Park Farms, Inc.

/s/ Petrich, J.

WE CONCUR:

/s/ Worswick, Stanley C. J.

/s/ Reed, Edward P.

APPENDIX E

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

MARY E. HARRIS, a single woman, et al, Respondent, v. SKI PARK FARMS, INC., Appellant.	NO. 12321-5-II DIVISION TWO ORDER (Filed Aug. 15, 1991)

This court having considered the motion for reconsideration of its previous opinion in the above entitled case, filed February 25, 1991 in Volume 60 Wn. App. at page 604, does herewith withdraw the prior opinion and adopts the opinion filed this date as the opinion of the court.

DATED this 15 day of August, 1991.

/s/ Petrich J.

/s/ Worswick, Stanley, C.J.

/s/ Reed, Edward P.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARY E. HARRIS, a single woman, et al, Respondent, v. SKI PARK FARMS, INC., Appellant.	NO. 12321-5-II DIVISION TWO AMENDED OPINION Filed: August 15, 1991)

PETRICH, J. – Ski Park Farms, Inc. appeals from the trial court's ruling on cross-motions for summary judgment[1] that the title to land consisting of an abandoned railroad right-of-way should be quieted in Mary E. Harris. The issue is whether the owners of property, over which an abandoned railroad right-of-way existed, relinquished their interest in the property underlying the right-of-way by a conveyance which excepted the right-of-way. We hold that by excepting the right-of-way from

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[1] Harris contends that the trial court resolved the issue based on stipulated facts by entering findings and conclusions. She thus argues that our task on review is simply to determine whether the findings are supported by the stipulation and whether the findings support the conclusions. She is mistaken. The trial court entered its order granting plaintiff's motion for summary judgment which designated the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. RAP 9. 12. No reference whatsoever was made to the findings and conclusions. The trial court's summary judgment order is now on review and, for our purposes, the trial court's findings and conclusions are superfluous. *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

the conveyance, the owners retained their interest in the property underlying the right-of-way and we reverse the trial court's summary judgment.

On July 2, 1864, pursuant to the 1864 Land Grant Act, Northern Pacific Railroad Company acquired ownership of a parcel of land legally described as the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E., (the "property"). Approximately 10 years later, Northern pacific conveyed the property to Sam Wilkeson, Jr., by warranty deed, reserving and excepting the disputed right-of-way property (the "right-of-way") as follows:

> Reserving and excepting, however, from the above described premises, a strip of land two hundred feet wide, extending through the same on the line of the railroad of the said Northern pacific Railroad Company or on the line of any of its branches to be used for a Right of Way or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress approved the 2nd day of July, 1864, and included in the aforesaid mortgage).

Subsequent conveyances of the original parcel passed the property from Hiram Sabin to John and Opal Winkelman on May 10, 1946. The warranty deed from Sabin to Winkelman contained the following language of exception relating to the right-of-way:

> EXCEPT, the right of way of the Northern Pacific Railway Company . . . and except tracks appropriated by Northern Pacific Railway Company in Cause No. 74807 . . .

Burlington Northern Railroad Company acquired Northern Pacific's interest in the right-of-way as a successor in interest. On December 7, 1984, the Interstate Commerce Commission authorized the abandonment of the right-of-way, which was then abandoned on February 15, 1985 by Burlington Northern. The abandonment was conducted pursuant to 43 U.S.C. § 912, which provides in pertinent part:

> Whenever public lands . . . have been . . . granted to any railroad company for use as a right of way . . . , and use and occupancy of said lands for such purposes has ceased . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all . . . interest . . . in said lands shall . . . be transferred to and vested in any person . . . to whom . . . title of the United States may have been granted, conveying . . . the whole of the legal subdivision or subdivisions traversed or occupied by such railroad . . . without the necessity of any other or further conveyance or assurance of any kind . . . whatsoever . . .

Although 43 U.S.C. § 912 states that the abandonment must be declared by an Act of Congress, Congress has delegated the authority to regulate the abandonment of rail lines to the Interstate Commerce Commission, which now has exclusive authority to authorize abandonments. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*,

450 U.S. 311, 321-23, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981). When Burlington Northern abandoned the right-of-way on February 15, 1985, Opal Winkelman, individually, and Opal Winkelman, Joan Nelson, and Mary Eytinge, as Trustees of the John C. Winkelman Family Trust (Winkelman), held fee title to the "legal subdivision or subdivisions traversed or occupied by" the right-of-way. Thus, at the time of abandonment, title to the right-of-way vested in Winkelman. However, Winkelman was not aware of the abandonment or the vesting of title.

On April 23, 1987, Winkelman sold approximately 60 acres of the Property to Ski Park Farms, Inc. for $143,500. On July 24, 1987, Harris entered into a real estate purchase and sale agreement with Winkelman for the purchase of property located within two government quarter sections, parts of which were bisected by the railroad right-of-way, resulting in three small parcels bounded by either roads, a creek, section lines or the right-of-way. The total sale price was $7,000. Harris, who drafted the legal description, included the following language: "excepting the Northern Pacific railroad right-of-way easement."

The sale closed on October 29, 1987. Prior to closing of the Harris purchase, the preliminary commitment for title insurance and all other closing documents, including the deed, were reviewed both by Harris and by an attorney on her behalf. The title policy and the deed included the following exception: "excepting therefrom right of way of the Burlington Northern (Formerly Northern Pacific) Railway Company." Then, on February 24, 1988, Winkelman, by quit claim deed, conveyed to Ski Park

Farms, Inc. the fee interest in the abandoned right-of-way property in close proximity to Ski Park's property.

In reviewing a summary judgment, this court engages in the same review as the trial court. *Del Guzzi Construction Co., Inc., v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986). Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986).

The issue here is construction of the Winkelman to Harris deed. The construction of a deed generally is a matter of law for the court. *Donald v. Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986). In construing a deed, the intent of the parties controls; particular attention is paid to the intent of the grantor when giving meaning to the entire language of the deed. *Carr v. Burlington Northern, Inc.*, 23 Wn. App. 386, 597 P.2d 409 (1979). The intent must be ascertained from reading the deed as a whole, and the words are to be given their ordinary meaning. *McKillop v. Crown Zellerbach, Inc.*, 46 Wn. App. 870, 873, 733 P.2d 559, *review denied*, 108 Wn.2d 1015 (1987).

Harris's primary position is that the term "right-of-way" is per se ambiguous, and that parol evidence must be employed to resolve the ambiguity. *Zobrist v. Culp*, 95 Wn. 2d 556, 627 P.2d 1308 (1981). She also invokes the rule of deed construction that ambiguities must be interpreted most favorably to the grantee and most strictly against the grantor. *Carr v. Burlington Northern, supra.*

However, that rule of construction is not helpful here because it was Harris, the grantee, who prepared the purchase and sale agreement containing the reference to the exception of the " right-of-way easement." The ambiguity in the term "right-of-way" must be interpreted equally favorably and detrimentally against both Harris and Winkelman.

Harris argues that the exception in the deed applied only to a railroad easement over the property described, and that since the easement was abandoned, she then owned the fee interest in the property. She relies on the language in the purchase and sale agreement, which excepted "the Northern Pacific railroad right-of-way easement." Her reliance on the purchase and sale agreement is misplaced. Provisions of a real estate contract and sale agreement and all prior negotiations merge into the deed delivered and accepted in fulfillment of the earlier contact. *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969).

An exception in a deed is a clause that withdraws from its operation some part of the thing granted and which otherwise has passed to the grantee under the general description. *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915). The ambiguity that must be solved is what Winkelman intended to except from the sale to Harris. The term "right-of-way" has indeed been used to denote a number of different interests in property. In the context of right-of-way created by the 1864 Land Grant Act and subsequent similar grants, the interest received by railroad companies before 1871 were referred to as a "limited fee, with right of reverter", while those received after 1871 were referred to as a "exclusive use easement." *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330,

1332-35 (9th Cir. 1990). However, the confusion as to the meaning of the term "right-of-way" need not be resolved because at the time of the conveyance to Harris, the right-of-way no longer existed.

The deed stated Winkelman's intent to except from the sale to Harris the "right-of-way of the Burlington Northern. . . . " We conclude that Winkelman intended to reserve whatever interest in the right-of-way they owned. Although not known to Winkelman, the right-of-way had been abandoned and Winkelman now owned all interest in the property where the right-of-way had previously existed. If the conveyance to Harris was intended to transfer the property where the right-of-way had existed, the exception language was superfluous.

We are satisfied that the Winkelman intended to reserve the property where the abandoned right-of-way traversed the quarter sections Winkelman conveyed to Harris. The later conveyance from Winkelman to Ski Park vested title to the abandoned right-of way property in Ski Park. The court erred in quieting title to the abandoned right-of-way property in Harris.

Reversed and remanded with instructions to enter summary judgment quieting title in Ski Park Farms, Inc. to that disputed portion of the abandoned right-of-way property described in Winkelman's quit claim deed to Ski Park Farms, Inc.

/s/ Petrich J.

WE CONCUR:

/s/ Worswick, C.J.

/s/ Reed, Edward P.

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

MARY HARRIS, Plaintiff, vs. SKI PARK FARMS, INC, et al, Defendant.	NO. 87-2-01090-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Sept. 7, 1988)

THIS MATTER having come on regularly for hearing before the undersigned judge upon the respective motions of Plaintiff and Defendant for Summary Judgment; the Plaintiff appearing and being represented by LOREN D. COMBS, of LOREN D. COMBS, INC., P.S. and the Defendants appearing and being represented by JAMES GAUTHIER of the law offices of JAMES SWIGART; and the Court having reviewed the files and records herein, having heard the arguments of counsel, having determined that there are no material issues of fact in dispute and deeming itself otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1.1 That the Plaintiff, Mary Harris has been a resident of Pierce County, Washington at all time [sic] relevant hereto;

1.2 That the Defendant, Ski Park Farms, Inc. is a Washington Corporation owning real property and doing business in Pierce County, Washington.

1.3 That the real property that is the subject of this matter is located in Pierce County, Washington.

1.4 That Opal V. Winkelman and the Winkelman Family Trust were the record owners of the real property that is the subject of this action at the time of the conveyance of the property to Plaintiff, Mary Harris, on October 29, 1987.

1.5 That the Pierce County Superior Court has jurisdiction over the subject matter and parties to this action and venue is properly laid in this Court;

1.6 That on or about July 24, 1987 the Plaintiff, Mary Harris, and the parties common Grantor Opal Winkelman, Mary Eytinge and Joan Nelson entered into an Earnest Money Purchase and Sale Agreement for the Grantors to sell and the Plaintiff to purchase real property in Pierce County, Washington;

1.7 That the Earnest Money Purchase and Sale Agreement was supported by consideration, was unambiguous and was a binding contract between the parties;

1.8 That the legal description of the property contemplated by the parties within the terms of the sale attached to and made part of the Earnest Money Purchase and Sale Agreement described the property as follows:

> "All of that portion of tax parcel number 5-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon

River Road excepting the Northern Pacific Railroad right-of-way easement.

All of that portion of tax parcel 5-19-26-2-007 lying between the South Prairie Creek and the South Prairie-Carbon River Road excepting the Northern Pacific Railroad right-of-way easement."

1.9 That the above quoted legal description was acknowledged by the grantor Opal Winkelman;

1.10 That the Plaintiff's intent to purchase the property in dispute subject only to an easement that may or may not have existed at the time of the conveyance was made clear to the Grantors.

1.11 That the wording of the legal description excepting an easement was significant in that it disclosed the Plaintiff's intent to acquire the underlying fee to the property subject to whatever rights of use the railroad had;

1.12 That the Grantors obtained a title report covering the property being conveyed. The title report disclosed that the Plaintiff had commenced a Quiet Title action under Pierce County Cause number 87-2-01090-8 and that the Quiet Title action included the property that is the subject of this dispute.

1.13 That the legal description attached to and made a part of the Warranty Deed from Winkelman, et al. to the Plaintiff was prepared by and at the direction of Winkelman, et al.;

1.14 That the language of exception of a right-of-way appearing in the Warranty Deed was ambiguous

with respect to the nature of the property interests excepted from the terms of the deed;

1.15 That Ms. Winkelman, her agents and associates and the family trust all understood from the Earnest Money Agreement that only an easement for a railroad right-of-way was to be excepted from the terms of the conveyance.

1.16 That there was no [intended /s/ EAM] modification of the terms of the Earnest Money Agreement with respect to the intent of the parties to only except an easement;

1.17 That the conveyance from the Grantors to the Plaintiff was ~~deficient~~ [ambiguous /s/ EAM] in that it failed to [clearly /s/ EAM] fulfill the understanding of the parties as evidenced by the Earnest Money Purchase and Sale Agreement;

1.18 That the Grantors and their agents never disclosed any intent to except the underlying fee to that portion of the disputed property formerly subject to a railroad right-of-way.

1.19 That there was a ~~scrivener's error~~ [ambiguity /s/ EAM] made in the legal description of the Statutory Warranty Deed in failing to ~~properly~~ [clearly /s/ EAM] identify the exception of an easement only [and thus the document was ambiguous /s/ EAM].

1.20 That the Warranty Deed from the Grantors to the Plaintiff should be ~~reformed~~ [interpreted /s/ EAM] to include the conveyance of the underlying fee of certain land formerly subject to a railroad right-of-way; [easement, or what was thought to be an easement /s/ EAM].

1.21 That on or about February 24, 1988 the Defendants obtained a Quit Claim Deed from the Grantors Winkelman, et al.;

1.22 That the conveyance of February 24, 1988, was made without warranties and that the Defendant, Ski Park Farms, Inc. knew [or are charged with knowledge /s/ EAM] that the Plaintiff was claiming title to a portion of the property described in the Quit Claim Deed at the time that they accepted the deed.

1.23 That the Court relied upon the representations of both counsel that all material facts in this case were before it prior to resolving the matter at Summary Judgment.

II. CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

2.1. This Court has personal and subject matter jurisdiction over the parties and venue is properly laid in this Court;

2.2. The Earnest Money Purchase and Sale Agreement was a valid contract entered into between the Plaintiff Mary E. Harris and the Grantors Winkelman, et al.;

2.3. The legal description attached to and made part of the Earnest Money Purchase and Sale Agreement only excepted an easement in favor of Burlington Northern Railroad from the terms of the conveyance;

2.4. The Grantors had fee simple title to all of the property described as that portion of the West half of the

Northwest quarter of Section 26, Township 19 North Range 5 East Willamette Meridian Pierce County Washington lying Southeasterly of South Prairie Creek and Northwesterly of South Prairie-Carbon River County Road; also that portion of the Southeast quarter of the Northeast quarter of Section 27 Township 19 North Range 5 East of Willamette Meridian Pierce County, Washington which lies Southeasternly of the Southeasterly margin of State Route 162 (Pioneer Way) and Northwesterly of South Prairie-Carbon River County Road.

2.5 The Grantor had actual [or constructive /s/ EAM] knowledge of the Plaintiff's ~~intent to acquire~~ [claim to /s/ EAM] the underlying fee to the property described in paragraph 2.4 above subject only to an easement of the railroad by the language of the Purchase and Sale Earnest Money Agreement and by the disclosure in the title report of the pendency of a Quiet Title action that included the subject property.

2.6. The intent of the parties as evidenced by the Earnest Money Purchase and Sale Agreement dated July 24, 1987, was to convey fee title to the above described property subject to whatever rights the Burlington Northern Railroad might still have to use a portion of the property. The Warranty Deed from Winkelman et al. to the Plaintiff Mary Harris is [ambiguous and is /s/ EAM] hereby ~~reformed~~ [construed /s/ EAM] to convey fee title to all of the land described in Paragraph 4 above. That title to all of the land described in Paragraph 4 above including whatever portion of that land was formerly subject to a railroad right-of-way is hereby quieted in the name of Mary E. Harris, Plaintiff herein.

2.7. The conveyance by Quit Claim Deed of February 24, 1988, from the Grantors Winkelman, et al, to the Defendants Ski Park Farms, Inc., was made without warranties of any kind. That the Defendant Ski Park Farms, Inc., is charged with knowledge that the Plaintiff Mary Harris was claiming title to a portion of the property described in the Quit Claim Deed of February 24, 1988;

2.8. Any Finding of Fact herein deemed to be a Conclusion of Law, is hereby incorporated into these Conclusions of Law, any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into the Findings of Fact.

DONE IN OPEN COURT this 7 day of Sept., 1988.

/s/ E. Albert Morrison
E. Albert Morrison, Judge

Presented by:

LOREN D. COMBS, INC., P.S.

By: /s/ Loren D. Combs
LOREN D. COMBS
Attorney for Plaintiff

Approved as to Form and Contents,
Notice of Presentation Waived:

LAW OFFICES OF JAMES SWIGART

By: /s/ James A. Gauthier
JAMES A. GAUTHIER
Attorney for Defendants.

APPENDIX G

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARY E. HARRIS, a single person, et al., Plaintiffs, vs. BURLINGTON NORTHERN, et al., Defendants.	No. 87-2-01090-8 DEFAULT JUDGMENT (Filed Dec. 31, 1987)

THIS MATTER HAVING come on for hearing on this date and the Plaintiffs having previously obtained an Order declaring the Defendants known as All Unknown Claimants Who Now or Hereafter Claim an Interest in the Real Property That is the Subject of this Action ("All Unknown Claimants") to be in default herein; and the matter having been otherwise settled by agreement of the parties as to all named Defendants; and the Court having considered the files and records herein; now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED that the following individually named plaintiffs shall have judgment against Defendants "ALL UNKNOWN CLAIMANTS" quieting title to those portions of former railroad right-of-way, which are the subject of this action, according to the terms of the plaintiffs Complaint for Declaratory Relief and more particularly set forth in legal descriptions

appended as exhibits hereto and Quieted to the Plaintiffs as follows:

Mary E. Harris- legal on exhibit 1
John C. Gratzer- legal on exhibit 2
Henry H. and Edith Rice- legal on exhibit 3
Williams Land Company >
Elmer G and Sharon N. Williams> legal on exhibit 4
Hans R. and Ruth Wilhelm- legal on exhibit 5
Marvin C. and Leta E. Anderson- legal on exhibit 6
James G. and Margaret W. Caviezel- legal on exhibit 7
Fred E. Hueneka>
Rose Hueneka > legal on exhibit 8
George E. and Ruth L. Langlois- legal on exhibit 9
Malcolm H and Emily E. Wilkinson- legal on exhibit 10
Harlan T. and Emma Ford- legal on exhibit 11
Arthur W. Miskar- legal on exhibit 12
Virgil and Leona Baker >
Mountain View Farms, Inc.> legal on exhibit 13
Vance and Patricia Baker- legal on exhibit 14
Guy A. and Evelyn West- legal on exhibit 15
Joe D. and Susan Vines>
Rebecca Vines > legal on exhibit 16
Elvera Honsowetz >
Dennis F. and Terri Larson> legal on exhibit 17
Leland K. and Patty S. Meitzler >
Stephen K. & Shirley E. Meitzler> legal on exhibit 18
August C. and Maureen Soler- legal on exhibit 19
Howard H. and Elizabeth J. Harman- legal on exhibit 20
Owen H. Dickson- legal on exhibit 21

Robert W. and Beverly Lindberg- legal on exhibit 22
Delmas F. and Catherine E. Zirkle- legal on exhibit 23
Sanford Zirkle- legal on exhibit 24
Steve and Joyce Albert- legal on exhibit 25
Ray L. and Donna J. Hart >
Dorothy & Clarence R. Jacobson> legal on exhibit 26
Roscoe L. & Dorothy L. Wissinger- legal on exhibit 27
John W. and Mary E. Weatherly- legal on exhibit 28
Ray H. and Lois B. Tinnon- legal on exhibit 29
Don and Lois Rolston- legal on exhibit 30
James and Nancy Graham- legal on exhibit 31
Opal L. Bloomberg- legal on exhibit 32
Erwin H. Knaack- legal on exhibit 33
Glen W. and Mary L. Reedy- legal on exhibit 34
Malcolm K. and Josephine Froud- legal on exhibit 35
Sherman and Evona Peterson- legal on exhibit 36
Douglas J. & Barbara Ann Peterson- legal on exhibit 37
Neil R. and Ann V. Husebye- legal on exhibit 38
William Paine and Linda Brown- legal on exhibit 39
Russell A. and Sherry L. Jones- legal on exhibit 40

Done in Open Court this 31 day of Dec, 1987.

/s/ E. Albert Morrison
Judge/Court Commissioner

Presented by:

LOREN D. COMBS, INC., P.S.

/s/ Donald A. Kellman
Donald A. Kellman
Attorney for Plaintiffs

APPENDIX H

A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Title Insurance Policy
for Mary E. Harris
Land Purchase: Oct. 29, 1987 Our No. A-49090
Grantor: Opal V. Winkelman Your No.

→ 4. PENDING ACTION IN PIERCE COUNTY SUPERIOR COURT.

CAUSE NUMBER: 87-2-01090-8
FILED: FEBRUARY 20, 1987
BEING AN
ACTION FOR: DECLARATORY RELIEF AND QUIET TITLE MARY E. HARRIS (CITIZENS AGAINST THE TRAIL)
DEFENDANT: U.S.A., PIERCE COUNTY, BURLINGTON NORTHERN RAILROAD COMPANY
ATTORNEY FOR
THE PLAINTIFF: DONAL A. KELLMEN

→ A LIS PENDENS OF SAID ACTION WAS RECORDED ON SEPTEMBER 11, 1987 UNDER RECORDING NUMBER 8709110334.

→ SAID LIS PENDENS IS A RE-RECORDING OF LIS PENDENS RECORDED UNDER RECORDING NUMBER 8702240436.

5. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE: THE ORTING LIGHT AND WATER COMPANY, A CORPORATION

PURPOSE: REPAIRING, RECONSTRUCTING OR OTHERWISE MAKING USE OF PIPE LINE SO OPERATED IN CONNECTION WITH SAID WATER SYSTEM, AND FOR ALL OF THE NECESSARY RIGHTS AND PRIVILEGES THAT ARE REQUIRED IN THE OPERATION OF SAID WATER PLANT AND SYSTEM.

AREA AFFECTED: PARCEL B

RECORDED: SEPTEMBER 04, 1925

RECORDING NUMBER: 769155

6. ANY QUESTION THAT MAY ARISE DUE TO SHIFTING AND CHANGING IN THE COURSE OF THE SOUTH PRAIRIE CREEK.

7. ANY PROHIBITION OF OR LIMITATION OF USE, OCCUPANCY OR IMPROVEMENT OF THE LANDS RESULTING FROM THE RIGHTS OF THE PUBLIC OR RIPARIAN OWNERS TO USE ANY PORTION WHICH IS NOW OR HAS BEEN FORMERLY COVERED BY WATER.

→8. RESERVATIONS AND EXCEPTIONS CONTAINED IN DEED FROM NORTHERN PACIFIC RAILROAD COMPANY: RESERVING AND EXCEPTING FROM SAID LANDS SO MUCH OR SUCH PORTIONS THEREOF AS ARE OR MAY BE MINERAL LANDS OR CONTAIN COAL OR IRON, AND ALSO THE USE AND THE RIGHT AND TITLE TO THE USE OF SUCH SURFACE GROUND AS MAY BE NECESSARY FOR MINING OPERATIONS AND THE RIGHT OF ACCESS TO SUCH RESERVED AND EXCEPTED MINERAL LANDS, INCLUDING LANDS CONTAINING COAL OR IRON, FOR THE PURPOSE

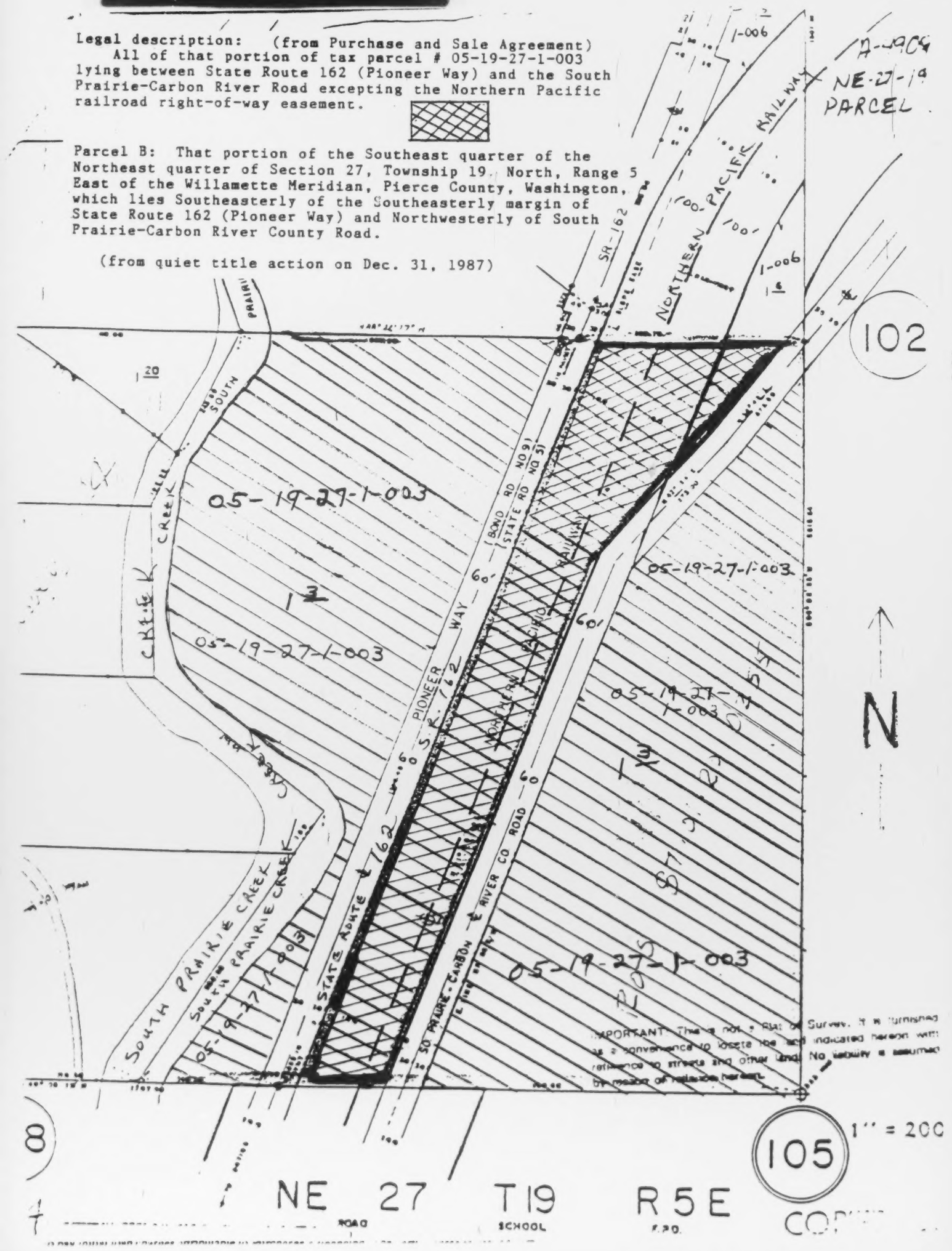
OF EXPLORING, DEVELOPING AND WORKING THE SAME.

RECORDED IN BOOK 27 OF DEEDS AT PAGE 97.

9. UNRECORDED LEASEHOLDS, IF ANY, RIGHTS OF VENDORS AND HOLDERS OF SECURITY INTERESTS ON PERSONAL PROPERTY INSTALLED UPON SAID PROPERTY AND RIGHTS OF TENANTS TO REMOVE TRADE FIXTURES AT THE EXPIRATION OF THE TERM.

10. RIGHT, TITLE AND INTEREST OF ROBERT W. WALLIN AND CAROLINE J. WALLIN AS DISCLOSED BY INSTRUMENTS RECORDED UNDER RECORDING NOS. 1915270, 1921551 AND 29070694.

BEST AVAILABLE COPY


Legal description: (from Purchase and Sale Agreement)
All of that portion of tax parcel # 05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road excepting the Northern Pacific railroad right-of-way easement.
Parcel B: That portion of the Southeast quarter of the Northeast quarter of Section 27, Township 19 North, Range 5 East of the Willamette Meridian, Pierce County, Washington, which lies Southeasterly of the Southeasterly margin of State Route 162 (Pioneer Way) and Northwesterly of South Prairie-Carbon River County Road.
(from quiet title action on Dec. 31, 1987)
A-104
NE-27-19
PARCEL
NORTHERN PACIFIC RAILWAY
SR-162
PIONEER WAY
STATE RD NO 91
BOND RD NO 51
SOUTH PRAIRIE CREEK
05-19-27-1-003
102
105
N
1" = 200
NE 27 T19 R5E
ROAD
SCHOOL

H-4

(LOGO) LEGAL
NOTICES

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR THE COUNTY OF PIERCE

MARY E. HARRIS, et al., Plaintiff, vs.
ALL PERSONS UNKNOWN WHO NOW OR HERAFTER [sic] CLAIM AN INTEREST IN THE REAL PROPERTY THAT IS THE SUBJECT OF THIS ACTION, et al., Defendants.
NO. 87-201090-81
SUMMONS ON COMPLAINT FOR DECLARATORY RELIEF AS TO QUIET TITLE (FOR PUBLICATION)

The State of Washington to the said unknown person or parties claiming any right, title, estate, lien or any interest in the real estate described in the Complaint herein:

You are hereby summoned to appear within 60 days after the date of the first publication of this Summons, to wit, within 60 days after the 3rd day of September, 1987 and defend the above-entitled action in the above-entitled Court and answer the Complaint of the Plaintiffs herein and serve a copy of your answer upon the undersigned attorneys for said Plaintiffs, at their office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the Complaint, which has been filed with the Clerk of said Court.

The object of this action is to quiet title to certain portions of the former Railroad rights-of-way which have been abandoned by Burlington Northern Railroad. Claims are made to portions of the former rights-of-way

within the following sections in Pierce County, Washington:

Section	Township	Range	Section	Township	Range
13	19 N	4 E	27	19 N	5 E
24	19 N	4 E	30	19 N	5 E
5	18 N	5 E	32	19 N	5 E
8	18 N	5 E	33	19 N	5 E
17	18 N	5 E	34	19 N	5 E
20	18 N	5 E	8	19 N	6 E
13	19 N	5 E	9	19 N	6 E
19	19 N	5 E	17	19 N	6 E
23	19 N	5 E	18	19 N	6 E
26	19 N	5 E	21	19 N	6 E
			28	19 N	6 E

If you have or claim an interest in the former Railroad right-of-way within the above-named section you must respond within the time limits stated above.

KIRSHENBAUM & COMBS
By: Donald A. Kellman
Attorney for Plaintiff
450 Shattuck Avenue So.
Suite 200
Renton, WA 98055
(206) 235-4800

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARY E. HARRIS, et al., Plaintiffs, vs. BURLINGTON NORTHERN RAILROAD COMPANY, et al., Defendants.	No. 87-2-01090-8 DISCLAIMER OF INTEREST (Filed Dec. 31, 1987)

1. Defendants Burlington Northern Railroad Company and Meridian Oil, Inc. (hereinafter Defendants), hereby disclaim all right, title and interest, if any, in and to the real property described in Exhibit A, attached hereto and made a part hereof.

2. Defendants, as their interest may appear, reassert and maintain all right, title and interest in and to any real property the subject of this action that is not described in Exhibit A and Plaintiffs do not contest such right, title and interest in Defendants or Defendants' mortgage trustees, subject, however, to the understandings contained herein.

3. To settle the dispute between Plaintiffs and Defendants, and for and in consideration of the waiver of claims referred to in paragraph 6 of the Stipulation of the Parties Upon Order of Dismissal, Defendant Burlington Northern Railroad Company shall, within a reasonable time after the entry of the Order of Dismissal, cause quitclaim deeds to be issued to the Plaintiffs Caviezel,

Dickson, Husebye, and Bloomberg, respectively, conveying to them the real property as their interest shall appear described in Exhibit B, attached hereto and made a part hereof, excepting and reserving all minerals and mineral rights heretofore reserved by Defendants or their predecessors in prior conveyances, as generally described in Defendant's Answers filed in this action. Defendant Burlington Northern Railroad Company shall, promptly after said conveyances, initiate procedures for the partial release of mortgage liens, if any, from the properties conveyed and deliver to Plaintiffs' counsel such partial releases in recordable form (or evidence thereof) upon their execution and delivery by the trustees.

Dated this 28th day of December, 1987.

Respectfully submitted,

GLACIER PARK COMPANY

/s/ Robert E. Walkley
Robert E. Walkley
Attorney for Defendants
Burlington Northern Railroad
Company and Meridian Oil,
Inc.

CONTENTS APPROVED:

LOREN D. COMBS, INC., P.S.

By /s/ Donald A. Kellman
Donald A. Kellman
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

MARY HARRIS, et al., Plaintiffs, vs. SKI PARK FARMS, INC. Defendants	NO. 87-2-01090-8 DECLARATION OF MARY E. HARRIS (Filed July 7, 1988)

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

The undersigned declarant, Mary E. Harris, declares under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. That on July 24, 1987, I signed a Real Estate Contract/ Earnest Money Agreement in the real estate office of Clark McGowan, the listing agent for Opal Winkleman, et al.

2. That prior to the above date I had filed an action seeking an order quieting title to real property formerly subject to a right-of-way of the Burlington Northern Railroad.

3. That it was my intention to acquire the ownership interest of the property formerly subject to a railroad right-of-way in the transaction with Winkleman et al.

4. The land that I acquired from Winkleman et al. included the easement area of the railroad. Without the former railroad right-of-way as a connecting link the adjoining land would have been fragmented, isolated or landlocked.

5. It was my intention to quiet title to the land formerly subject to a railroad right-of-way and unify the property involved.

6. That it was my understanding that I was acquiring the underlying fee or any reversionary interest that Winkleman had in the former right-of-way when I made the purchase from her.

7. The Earnest Money Agreement clearly defines the land as that portion of tax parcel number 5-19-27-1-003 lying between State Route 162 and the South Prairie/ Carbon River Road except for the easement of the Burlington Northern Railroad.

8. That during the purchase transaction, I had no contact with Mrs. Winkleman or her son-in-law, Jonathan Eytinge. When I initially contacted them about buying some land, Mrs. Winkleman told me that her son-in-law, Mr. Eytinge, was handling everything. She gave me his phone number. I called him and was told that Clark McGowan was the real estate agent handling the transaction for them and that they did not want to get involved in the business of the sale.

9. After I signed the Earnest Money Agreement, I gave my attorney the preliminary legal description of the property and told him to include it in the Lis Pendens for the Quiet Title action which was in progress.

10. The seller, Mrs. Winkleman, ordered and paid for a title insurance report and policy.

11. The final exceptions and encumbrances were reviewed by both buyer and seller.

12. Clark McGowan reviewed the title report as the listing agent for the seller.

13. No objection to the Lis Pendens was ever voiced to me by any party involved in the real estate transaction.

14. There was conversation about the abandoned right-of-way between myself and Mr. McGowan. I gave him a copy of a Tacoma News Tribune article of October 5, 1986, with a long story about the former right-of-way and my petition drive to save it from being turned into a public trail.This [sic] article is currently in his real estate file along with records of my sale transaction. I recall that Mr.McGowan [sic] on two occasions, before closing, asked me whether the railroad had disclaimed its interest in its right-of-way on the property.

15. The Quit Claim Deed from Winkleman to Ski Park Farms purports to convey the grantor's interest in several portions of land formerly subject to railroad rights-of-way. The monetary consideration for the Quit Claim deed was $250.00. The disputed area covers about one-third of this area. The grantors attempted to convey their interest in the disputed property for approximately $83.33.

16. In addition to slandering the title to my deed for the land formerly subject to a right-of-way, the grantors have slandered the potential title and reversionary interest in the former railroad right-of-way of three other land-holders to the south and west by the Quit Claim deed.

17. No attorney retained by me has ever indicated that the exception for the right-of-way easement could ever be interpreted as withholding the reversionary interest.

18. Although the right-of-way had been abandoned, it had not been officially vacated through the Quiet Title process. The railroad had not yet given a disclaimer of interest on the date of the sale.

19. Winkleman et al., therefore had to refer to the right-of-way as an exception on the deed to me.

20. I now have the right to the disputed property based upon the Quiet Title proceeding and the disclaimer of interest filed by Burlington Northern.

DATED this 5th day of July, 1988, at Tacoma, Washington.

/s/ Mary E. Harris
Mary E. Harris

(SEAL)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., et al., Respondent.	NO. 5860-4 Court of Appeals No. 12321-5 Superior Court Cause No. 87-2-01090-8 AFFIDAVIT OF DONALD A. KELLMAN

STATE OF WASHINGTON)
) ss.
County of Spokane)

DONALD A. KELLMAN, being first duly sworn upon oath deposes and says:

1. That I am an attorney in the State of Washington. I make this Affidavit based on personal knowledge of the facts contained herein.

2. I was formerly one of the attorneys representing the plaintiff/petitioner, Mary E. Harris. I represented Ms. Harris in a quiet title action in Pierce County Superior Court. I took part in the preparation and argument of a motion for summary judgment that engendered the case at bar.

3. I have read the opinion of the Court dated February 11, 1993. I noted in the opinion several references to an unsigned Declaration of Mary E. Harris. The purpose

of this Affidavit is to provide the Court with facts concerning the filing of said Declaration.

4. With input from Ms. Harris, I prepared the Declaration in question and reviewed its contents with her over the telephone. In order to meet filing deadlines, the unsigned Declaration was filed with a notation that the original would be filed in Court at the hearing. On the day of the hearing, Ms. Harris was in Court and signed the original Declaration. This document was then filed in open court and is part of the Superior Court's file. A true and correct copy of the signed Declaration of Mary Harris, filed in Pierce County Superior Court, is attached hereto and incorporated herein by this reference.

5. The Court's Opinion makes reference to the fact that Ms. Harris was represented by counsel at the time of her negotiation and purchase of the disputed property from Winkleman. Neither I nor my former firm represented Ms. Harris in that purchase and sale transaction. Our representation related to a quiet title action in which Ms. Harris was one of a large group of plaintiffs. Neither I nor my former firm was asked to nor did we review any of the purchase and sale documents prior to the closing of the sale.

Further your affiant sayeth naught.

/s/ Donald A. Kellman
DONALD A. KELLMAN

SUBSCRIBED AND SWORN to before me this 25th day of February, 1993.

/s/ Illegible

NOTARY PUBLIC in and for the
State of Washington residing at
Spokane
My Commission Expires: 3/1/94

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

MARY HARRIS, et al., Plaintiffs, vs. U.S.A., et al., Defendants.	NO. 87-2-01090-8 DECLARATION OF JOHN BECKER (Filed July 21, 1988)

STATE OF WASHINGTON)
)
COUNTY OF THURSTON)

JOHN BECKER, declares:

1. That I am the individual who prepared the legal description of the property conveyed by Winkelman, et al., to Mary E. Harris recorded under auditors fee number 8711100338.

2. That this description was prepared in the course of my regular employment with Keyes and Associates at the request of Clark McGowan, agent for the seller Winkelman et al.

3. That there was no specific request or intention expressed by the seller to reserve a fee interest in the

portion of the property formerly subject to a railroad right-of-way and described in the deed under the heading *PARCEL B*.

4. That there was no inquiry or discussion undertaken, to my knowledge, as to the status of the Burlington Northern Railway Company's interest in the subject property at the time of the sale.

5. That I had no knowledge one way or the other as to whether the Burlington Northern Railway Company had abandoned its right-of-way interest in the subject property at the time of the sale from Winkelman to Harris.

6. That the use of the language "excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company" in the legal description of *PARCEL B* in the deed of October 29, 1987, was a recognition of the fact Burlington Northern Railroad Company at one time or perhaps still had a right-of-way interest in the subject property. The language was not included for the purpose of excepting the fee interest from the terms of the sale.

7. Had I been instructed to prepare a legal description for the deed that reserved the fee interest in the property formerly subject to a railroad right-of-way I would not have used the language that appears in the deed.

8. The language in the deed of October 29, 1987, is consistent with the description of the subject property through the chain of title.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Executed in Yelm, Washington, on June 21, 1988.

/s/ John W. Becker
John Becker
(SEAL)

TRINITY LAND COMPANY
315 39th Ave SW Ste #8
Puyallup, WA 98373-3625

July 31, 1987

Mary Harris
P. O. Box 44384
Tacoma, WA 98444

Mary,

Enclosed please find a copy of the Earnest Money Agreement which has been signed by the seller, for your records.

The title report has been ordered and I will keep you informed on our progress.

Sincerely,

/s/ Clark R. McGowan
Clark R. McGowan

CRM/leg
Enclosure

LOGO TRINITY
LAND COMPANY
TIMBER • LAND • COMMERCIAL
BUS. 848-7700 848-9773 RES.

August 25, 1987

Mary Harris
P. O. Box 44384
Tacoma, WA 98444

Mary,

Please find enclosed a copy of the extension on closing initialed by the seller.

I am working with the engineer on obtaining the legal description for the title report.

Sincerely,

/s/ Clark R. McGowan
Clark R. McGowan

CRM/leg
Enclosure

ASSET RECOVERY, INC.
2324 NO. CRAWFORD ST.
PORTLAND, OREGON 97203

No 1370
TELE: (503) 289-7311
FAX: (503) 289-7337

Sold to:
Pierce County Washington
Dept of Parks, Recreation &
Comm. Services

Address:
9112 Lakewood Dr. SW
Tacoma, WA 98499

City, State, & Zip:
Attn: Mr. Jan Wolcott

Shipped to:

Customer Order #:
Terms:
F.O.B.:
Shipment Date:
Invoice Date: 1/26/88
Due Date:

Quantity	Description	Unit Price	Total
3	Bridges, Cascade Junction, Carbonado, Wilkeson		
7	Bridges, Cascade Junction, McMillin		
	Bridges along abandoned BN Rail Lines as detailed above		
	as per attached description		
	TOTAL		1.00

We've received payment – Thanks

APPENDIX I

Post Office Box 44384
Tacoma, Wash. 98444
March 17, 1986

Mr. Louis Gitomer, Deputy Director
Rail Division Office of Proceedings
Interstate Commerce Commision [sic]
12th and Constitution
Washington, D. C. 20423

Dear Mr. Gitomer,

Recently the Burlington Northern Railroad abandoned a stretch of railroad right of way between Orting, Washington and Cascade Junction in Pierce County of Washington State. I own a parcel of land which is bisected by this right of way about 2 miles north of Crocker, wash. [sic] I would like to acquire this portion of the abandoned right of way which cuts my land in two so I can put the two pieces back together again.

Would you please tell me how to do this, what office I should contact, their phone number or address?

I am enclosing a copy of the notice of intent to abandon, Docket No. AB-6(Sub-No. 226: Burlington Northern Railroad Co. abandonment Between Orting and Cascade Junction, Washington.

Please answer as soon as possible. Thank you.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris
P.O. Box 44384
Tacoma, Wash. 98444

Interstate Commerce Commission
Washington, D.C. 20423

OFFICE OF PROCEEDINGS

March 26, 1986

Ms. Mary E. Harris
P.O. Box 44384
Tacoma, WA 98444

Dear Ms. Harris:

This responds to your recent letter inquiring into how you may purchase a portion of abandoned Burlington Northern Railroad Company (BN) right-of-way that bisects your land. This Commission authorized the abandonment in Docket No. AB-6 (Sub-No. 226), *Burlington Northern RR. Co. – Aband. – In Pierce Co., WA* (not printed), served December 7, 1984, and BN abandoned the line on February 15, 1985.

This Commission has no jurisdiction over the disposal of a railroad right of way once an abandonment has been consummated. You must deal directly with BN. Dave Williams is the official at BN's property management division who is responsible for Washington land sales. He may be reached at the following address: 3300 Continental Plaza, 777 Main Street, Fort Worth, TX 76102. His telephone number is (817) 878-1532.

As is often the case, BN, in its abandonment application, did not claim to have fee-simple title to all the land comprising its right-of-way. Because this Commission does not maintain land records, you may first want to check your county land records to determine if there is a

reversionary interest in the segment of right-of-way bisecting your property.

Sincerely,

/s/ Louis E. Gitomer
Louis E. Gitomer
Deputy Director
Rail Section

Post Office Box 44384
Tacoma, Washington
April 17, 1986

Mr. Dave Williams, Property Manager
Burlington Northern Railroad
3300 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

Dear Mr. Williams,

Recently the Burlington Northern Railroad abandoned a stretch of railroad right of way between Orting, Washington and Cascade Junction in Pierce County of Washington State. I own a parcel of land which is bisected by this right of way about two miles north of Crocker, Washington. I would like to acquire this portion of the abandoned right of way which cuts my land in two so I can put the two pieces back together again.

Would you please tell me how to do this – what office I should contact?

I am enclosing a copy of the Notice of Intent to Abandon, Docket No. AB-6(Sub-No. 226: Burlington Northern Railroad Co. Abandonment between Orting and Cascade Junction, Washington.

I am enclosing a plat map of the area, a legal description of the land involved and a recent letter from Louis Gitomer of the ICC.

Please answer as soon as possible. Thank you.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris
Post Office Box 44384
Tacoma, Washington 98444

LOGO BURLINGTON NORTHERN RAILROAD

3300 Continental Plaza
777 Main Street
Ft. Worth, Texas 76102

SALES and PROPERTY
MANAGEMENT DEPARTMENT

July 14, 1986

Ms. Mary E. Harris
P. O. Box 44384
Tacoma, WA 98444

Dear Ms. Harris:

This refers to your letter of April 17, 1986 and telephone call of July 11, 1986 regarding your purchase of Burlington Northern's right of way near Crocker, Washington on our Orting to Cascade Jct., Washington line.

We will hold your inquiry on file with others until we can make final decision on how the right of way will be sold.

We want to sell as much of the right of way as we can with one deed and are hopeful that a group can be formed to purchase the line. Our minimum fee for a deed and mortgage release is $2,000 which only covers our legal and paper costs.

Sincerely,

/s/ R. C. Flaherty
R. C. Flaherty
General Manager Real Estate

BN 7219 Orting-Cascade Jct., WA

cc: D. A. Cowles

Mary E. Harris
Post Office Box 44384
Tacoma, Washington 98444
July 28, 1986

R. C. Flaherty
General Manager – Real Estate
Burlington Northern Railroad
3300 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

Dear Mr. Flaherty,

Thank you for your letter of July 14, 1986 regarding my inquiry about the abandoned Burlington Northern right of way near Crocker, Washington in Pierce County (BN 7219 Orting-Cascade Jct., Wa.).

As you are aware, I wrote a letter dated April 17, 1986 and also one dated June 14, 1986 concerning a portion of this right of way in which I am interested. In my letter of June 14, 1986 I made an offer of $2,000 cash for a portion of the strip adjacent and bisecting my land. In your letter of July 14 you mention that your minimum fee for a deed is $2,000. I would accept a quit claim deed for this strip and would have an attorney here draw up the appropriate paperwork as necessary, to save your firm time and money.

I am again enclosing a scale plat map and legal description of this portion of the right of way in which I am interested.

I understand according to your letter of July 14, 1986 that you want to sell as much of the right of way as you can with one deed. The part that I have designated is about all I can handle, pay taxes on and work as an integrated part of the land which I already have there.

I wish to negotiate this purchase with you now as I have been told by Mr. Loren Combs, an attorney from Renton, Washington, that your firm has already sold several other portions of the right of way near Buckley, Washington to adjacent property owners. He has acted as their agent in this purchase. Therefore, I wish to deal with you now,

directly, rather than to go through a third party which may be unnecessary.

In June, 1986 I spoke with Mr. Ken Brewer, Pierce County Property Manager, who told me that this particular part of the right of way, between Orting and Cascade Junction is NOT included in any proposed land swap between Pierce County and Burlington Northern. Mr. Ken Brewer's telephone number is 1-206-591-7112. Therefore, this possibility should not preclude your selling me this portion of the strip of right of way.

I will be hopefully waiting your reply.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris

enclosures

Post Office Box 44384
Tacoma, Washington 98444
January 15, 1987

Pierce County Assessor
Pierce County Annex
2401 South 35th Street
Tacoma, Washington 98409

Dear Sir,

I am the owner of tax parcel #05-19-27-1-006.

The legal description is:

"That portion of the northeast quarter of the northeast quarter of Section 27, Township 19, north, Range 5

East, lying southeasterly of Orting-South Prairie Highway, except railroad right of way easement of record."

My parcel is bisected by a portion of the railroad right of way which was officially abandoned by the Burlington Northern Railroad company on February 15, 1985.

The recent Washington State Supreme Court decision, Wilbur H. Lawson et al v. the State of Washington et al of December 24, 1986 declared: "at common law, where a deed is construed to convey a right of way for railroad purposes only, upon abandonment by the railroad of the right of way, the land over which the right of way passes reverts to the reversionary interest holder free of easement".

On the advice of my attorney, I am thereby, requesting that you assign a tax parcel number to the segment of abandoned railroad right of way bisecting my parcel. In addition, send me a statement of property taxes now due on this portion, from the date of abandonment, as I wish to pay them immediately.

My parcel is outlined in yellow. The abandoned railroad right of way segment is outlined in red, for your convenience. I will be expecting your prompt reply.

Sincerely,

/s/ Mary E. Harris
Mary E. Harris

LOGO

PIERCE COUNTY

SHELDON K. COOK
Assessor-Treasurer

OFFICE OF THE ASSESSOR-TREASURER
2401 South 35th Street, Room 2
Tacoma, Washington 98409-7498

January 21, 1987

Mary E. Harris
P.O. Box 44384
Tacoma, WA 98409

Dear Ms. Harris:

Receipt of your letter dated January 15, 1987 is hereby acknowledged.

Because of the nature of your request and the controversy surrounding the Burlington Northern right of way, by copy of this letter, I am directing your request to the Pierce County Prosecuting Attorney's office for review.

When this office receives a determination upon the propriety of your request, we will notify you and perform accordingly in a timely manner.

Sincerely,

/s/ Sheldon K. Cook
Sheldon K. Cook

cc: Bob Dick, Deputy Prosecution Attorney
Jan Wolcott, Park & Recreation Director
Ken Brewer, Real Property Manager

JOHN W. LADENBURG
PIERCE COUNTY PROSECUTING ATTORNEY
946 County-City Building
Tacoma, Washington 98402-2171

Main Office: 591-7400
Felony Charging Unit: 591-7442
Family Support: 591-7444
Juvenile Division: 593-4471
Traffic/Misdemeanor: 591-7446
Victim/Witness Assistance: 591-7448

January 23, 1987

Mary E. Harris
P. O. Box 44384
Tacoma, Washington 98444

Dear Mrs. Harris:

Your letter of January 15, 1987 to the Pierce County Assessor has been referred to me for answer. As you know, the ownership of the former railroad property varies greatly depending upon many variables including ownership at the time of its acquisition, federal statutes, and other provisions of state law. In addition, Burlington Northern has not abandoned its claim of ownership to the property because of the varied manner in which segments thereof were acquired. Accordingly, Pierce County is not yet able to determined [sic] ownership of any portion of the right-of-way with sufficient certainty to determine the appropriate boundary lines for any segregation or to determine the taxpayer to whom statements should be sent.

The County is currently studying land titles and property boundaries of adjoining parcels, but the process

is expected to take some time. Your request to the Assessor-Treasurer will be retained in that office and when a determination can be made as to the basis for taxation of the former right-of-way and segregation, you will be notified.

Sincerely,

JOHN W. LADENBURG
Prosecuting Attorney

By: /s/ Robert P. Dick
Robert P. Dick,
Deputy Prosecuting
Attorney

RPD1:sab
cc: Kenneth Brewer, Real Property Manager
Jan Wolcott, Park and Recreation Director
Lloyd Nickel, Deputy Prosecuting Attorney